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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

DECEMBER 6, 2024

(FRIDAY SESSION)

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        Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in and for the State of Texas, reported  
by machine shorthand method, on the 16th day of August,  
2023, between the hours of 9:03 a.m. and 12:14 p.m., at  
Vinson & Elkins, 200 West Sixth Street, Suite 2500,  
Austin, Texas 78701.

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1 collectively have done some good for the state.

2 I think, as I wander around our country and  
3 talk to other lawyers about rules, it is not infrequent  
4 that they point to our rules as things that they wish they  
5 had in their jurisdiction and things that work, and  
6 sometimes I'll go into a jurisdiction where they don't  
7 know about our rules, and I'll say, "Well, why don't we do  
8 it this way?"

9 "Oh, no, that will never work." Well, yeah,  
10 it will work, if you give it a try, and so we have, I  
11 think, done some good work, and we've had some  
12 controversy, but -- but not within the committees.  
13 Sometimes outside the committee people have raised issues.  
14 I think about the family law forms as the pinnacle of our  
15 controversial work on this committee, but, in any event,  
16 it's been a great ride with the Chief, and so I add my  
17 personal thanks, try not to get emotional about it, but  
18 thank you, Nathan, for everything, and now you have to  
19 give a tremendous final speech to this group.  
20 Lincolnesque, actually, is what we're looking for.

21 CHIEF JUSTICE HECHT: Well, I'm not sure  
22 I'm up to that. I have been the liaison to the committee  
23 since I got on the Court, thanks to Tom Phillips, who  
24 asked me to do it and knew of my interest in it in the  
25 years preceding my coming onto the Court. It's changed a

1 lot over the years. Bill Dorsaneo and Buddy Low used to  
2 tell me that when they had meetings back in the Seventies  
3 and before, they had them in the Supreme Court courtroom,  
4 and there weren't as many members as there are now, and  
5 the members came in and sat down, and Chief Justice  
6 Calvert told them what they were going to do, and they did  
7 it, and they went home. So we -- I haven't been able to  
8 run it like that. Maybe Bob had something I didn't, but  
9 it's been a great committee, but the one thing I'll say to  
10 you is that I was thinking about this over the years. I  
11 don't remember a time where we got your recommendations  
12 and report and your analysis and the transcript of the  
13 meeting and looked over it and said, "Okay, that's what  
14 we're going to do," and then later thought, "Oh, my  
15 goodness, why did we do that? That was a terrible  
16 mistake, what was the committee thinking, why didn't they  
17 do something like this."

18                   And so the track record, as far as  
19 satisfaction with the committee's recommendations that  
20 we've adopted, is -- I can't remember a time when we were  
21 less than pleased. We didn't always take the  
22 recommendations. Sometimes because things had changed,  
23 sometimes because the Court's view of things had changed,  
24 but we were sure by the time it got out of here that you  
25 had kicked the wheels as hard as they could be kicked,

1 that you had checked every screw, every comma, every  
2 semicolon, and were satisfied that if we did that, it was  
3 going to achieve its intended purpose. So we thank you  
4 for that, and that's still the view of the Court.

5           There are lots of times when we're talking  
6 about something, and we are pretty -- we have a pretty  
7 good idea on the Court that this is what we want to do,  
8 but invariably we say, well, we better go get the  
9 committee's advice on that, because there may be something  
10 that we're not thinking about or something that they'll --  
11 they will uncover. So illustrative of that is our  
12 repeated return to you on AI, because this is a developing  
13 thing, and it just has lots of pieces to it, and we're --  
14 we are just going to have to keep rethinking and  
15 rethinking as time passes and see -- see how it develops.

16           So it's been a great pleasure for me and a  
17 great learning experience, and I'm grateful to have been  
18 able to share that work with all of you and with my good  
19 friend Chip.

20           I'll just give you a short report on the  
21 update of the Court. We had oral argument in Houston at  
22 the University of Houston Law Center in November, and that  
23 was -- no, October. That was a good event for us. The  
24 pandemic messed us up on our out of -- out of Austin  
25 visitation schedules, and we were going pretty -- pretty

1 regularly in the spring and the fall, and then we couldn't  
2 go at all for a while, and now we're getting back into it.  
3 So we'll be doing that more and more ahead.

4           You know we had the licensed  
5 paraprofessional rules out. We got comments. The period  
6 was supposed to end December 1st, but we've extended it  
7 because we got a lot of comments and a lot of interest  
8 shown in those rules, and we are still hopeful that they  
9 will make a meaningful impact on providing access to  
10 justice for the poor, which is kind of the fundamental  
11 idea behind them, is to multiply legal services by having  
12 some routine services performed by nonlawyers. So we'll  
13 see. Those are still under advisement.

14           We put out rules requiring bookmarking of  
15 cites in court papers, petitions for review, appendices,  
16 briefs, so on, and that's very helpful. I think -- I  
17 wasn't able to get this done on my watch, but I think it's  
18 in the offing that we will soon, maybe in a few years,  
19 have nothing in the appellate record that is not  
20 electronic, so that the judge, the clerk, the lawyers,  
21 everybody, can simply push a button and see. If you're  
22 interested in the third amended petition, the judge is,  
23 and it's not in the appendix, then you just reach over and  
24 look at it and take all of the clerical manipulation of  
25 the record, composition of the record, out of the process.

1 So we're looking forward to that.

2           The business courts are busy. I think, as  
3 of yesterday, 28 cases have been filed in the business  
4 courts, and 24 were moved, so they have 52 cases pending.  
5 Houston has the most, with 22; Dallas, 13; San Antonio,  
6 eight; Fort Worth, five; and Austin, four. This has been  
7 a huge project, and I appreciate your work on the rules,  
8 procedural rules. Again, the -- the part of that process  
9 that was really helpful to the Court was we were quite  
10 sure by the time you finished, Marcy Greer's committee  
11 finished, and we had recommendations, that we had thought  
12 of everything possible that might go wrong, that needed to  
13 be anticipated, and so the courts are underway. Finding  
14 them space, getting them staffed, making it more of a  
15 regular process has been a tremendous managerial issue for  
16 the Office of Court Administration, but Megan and others  
17 are on top of that, and they continue to work on it, so I  
18 think we're moving along there.

19           And the Fifteenth Court of Appeals had about  
20 a hundred cases transferred to it on September 1st of this  
21 year, and there have been a few since and a few  
22 retransferred back, so this is kind of a dynamic process,  
23 a little bit. Sometimes a case gets over to the Fifteenth  
24 Court and the lawyers get to looking at it and think,  
25 well -- or maybe one side -- it shouldn't be there or



1 maybe the courts of appeals themselves don't agree where  
2 the case should be, so we look at those occasionally, and  
3 that will be an ongoing process.

4           Let's see, as of yesterday, 30 new cases had  
5 been filed in the Fifteenth Court of Appeals. They argued  
6 seven so far, and they have three set for December, and  
7 they have arguments scheduled in January and February at  
8 the UT Law School. So they are very much underway and  
9 should be -- should be forging ahead.

10           Our friend, Senator Zaffirini, is having the  
11 Webb County courthouse named in her honor next Tuesday.  
12 It is named the Dean Senator Judith Zaffirini Justice  
13 Center. So that's a mouthful, but a well-deserved honor  
14 for our good friend who is -- has always been interested  
15 in judicial and rules issues, and so we look forward to  
16 celebrating that with her.

17           And, finally, I'll just say that, in  
18 anticipation of my transition here shortly, the Court is  
19 in a very good spot, and everybody is working very hard,  
20 and we have a pretty good schedule to work with, and so  
21 we -- I anticipate the Court will go forward strongly. So  
22 maybe that doesn't sound like Abe Lincoln, but that's  
23 my -- four score and seven years ago I started on the  
24 Court, so --

25           CHAIRMAN BABCOCK: It's a little more Harry

1 Truman than Abraham Lincoln, I think, but well done, as  
2 always. I feel like I've had a part-time job following  
3 the Chief around the state as he gets accolade after  
4 accolade, and his acceptance of these awards is always  
5 gracious and insightful. One of the things he's fond of  
6 repeating is "I shouldn't be recognized for just doing my  
7 job," and of course, we all are trying to do our jobs, but  
8 he has done it better than anybody I've ever seen, and you  
9 never, in this day and age, see people from both sides of  
10 the aisle look up to him and believe that he's done just  
11 amazing things with this State. So -- so I wasn't going  
12 to say that, but now I am.

13                   So, now, Justice Bland, it's up to you to  
14 top all of this.

15                   HONORABLE JANE BLAND: Well, you know,  
16 ordinarily, I'm -- as I've said before, I'm Charlie Munger  
17 to the oracle of Austin and have nothing to add, but today  
18 I'll say a little bit.

19                   First of all, I'll remind you all that we  
20 have lunch at Malverde after the meeting today, and all  
21 are invited, and as you remember, we took a vote, and it  
22 was one of the rare unanimous decisions of this group to  
23 celebrate Chief Justice Hecht, so no sneaking out to have  
24 client phone calls or do some sort of busy work. You all  
25 committed, and we're looking forward to paying our

1 personal compliments to the Chief. Also, no speeches,  
2 just fun, but I'm going to say a little bit here about  
3 what the Chief has done with respect to rules.

4           Obviously, many of you have been a part of  
5 the rules that we have created over the last few decades,  
6 so this will be a little bit of a reminder to you, but as  
7 the Chief said, he's been the liaison to the rules  
8 committee since 1989, and in that roll, I think one of the  
9 first projects was really to create the modern day Rules  
10 of Appellate Procedure, and our Rules of Appellate  
11 Procedure today look nothing like what they looked like  
12 when I began the practice, and it has provided a really  
13 stable basis for all of the innovations in appellate  
14 practice that we've seen and the move to electronic filing  
15 and all of the things that came after, because they were  
16 workable rules, they were approachable, and hopefully  
17 eliminated some of the technical traps that the old writ  
18 of error process used to create for lawyers, and their  
19 clients' cases were getting poured out for reasons other  
20 than the merits, which is not the goal of the justice  
21 system.

22           The simplification of the justice court  
23 rules, I've always wondered why a no record court with the  
24 lion's share of presiding judges having no law degree can  
25 be so complicated in terms of rules, and we're continuing

1 to work to try to simplify those rules, and they are very  
2 important to most Texans, because it is the place where  
3 evictions happen, it is the place where debt collection  
4 happens, and these topics affect far more Texans than  
5 anything in our district courts or our county courts at  
6 law, and the Chief was instrumental in recognizing that it  
7 was not a one-size-fits-all kind of process for every case  
8 in justice court, and maybe because a lot of these  
9 presiding judges were not licensed attorneys, that was  
10 even a better reason to have some clear rules about how to  
11 handle these cases.

12                   Obviously, the advent of e-filing, I  
13 remember when this committee was broached with the idea  
14 that we were going to have electronic filing across the  
15 state and everybody said how's that ever going to happen?  
16 It's -- it was like how to eat an elephant, right, and  
17 this committee was such an essential part of figuring out  
18 how to conquer electronic filing and in a way that we  
19 didn't know what it would look like at the end of the  
20 road, but just beginning the process, and then through the  
21 Chief's leadership, you know, making it happen and making  
22 that transition a smooth one; and, again, with an eye to,  
23 during that transition especially, not penalizing lawyers  
24 for an unfamiliarity with this new thing called e-filing  
25 that we now are so dependent on.

1                   And thank goodness we had it, because, you  
2 know, the Chief then was confronted with the pandemic, and  
3 as he -- as he likes to say, you know, we were operational  
4 within about 48 hours, because he and David Slayton  
5 procured for every judge in Texas something called a Zoom  
6 license, and most of us didn't know what that was, and  
7 most of us didn't know what we were going to do with it,  
8 but between that and e-filing, we were able to conduct  
9 remotely, when we had to, court proceedings so that the  
10 courthouses did not shut down during the pandemic, and we  
11 were up and running back in person just as quickly as we  
12 could.

13                   And, you know, I think as he worked with  
14 judges across the state -- I mean, I'm sorry, across the  
15 country, during the pandemic in giving them ideas about  
16 how to keep their courts up and running, he marveled  
17 about, you know, what a difference it made that we had  
18 electronic filing. Some courts in some states are still  
19 very dependent on paper and going to the courthouse to  
20 make a filing, to retrieve a filing, to copy a filing, so  
21 we were, you know, far ahead of the game, thanks to this  
22 committee's work and the Chief's prescience about the  
23 importance of electronic filing. He always looks for  
24 ways, as you know, to make the justice system more  
25 transparent, more efficient, but always with the eye of

1 doing justice.

2                   So to that end, we also worked for a few  
3 years on the rules for indigents and how to simplify and  
4 make it more approachable for somebody who wanted to  
5 proceed with their case without payment of court costs,  
6 and then, of course, as I mentioned, the advent of remote  
7 proceedings, which the silver lining, as we all know, is  
8 that we have been able to harness this as an important  
9 tool and with the creation of remote proceedings rules and  
10 the rules changes in 2022. And I think the thing that the  
11 Chief is, you know, continuing to run through the tape,  
12 I'm sure you're not surprised about that, and, in  
13 particular, is working to find the best way forward for  
14 paraprofessional rules that will expand access to routine  
15 legal services for those who cannot afford a lawyer.

16                   There's the whole human side of this, which  
17 is often overlooked, because obviously you can't get any  
18 of these soaring legal projects accomplished without human  
19 beings who are committed to the notion that we can get it  
20 done, and -- and the Chief as a leader, he has always  
21 inspired that confidence and that diligence in what is a  
22 completely volunteer job for all of you to do your very  
23 best work for this committee.

24                   He served with over 160 members of this  
25 committee, and given that some of you are perennially

1 renamed, you know, that's quite a number. He's worked  
2 with nine rules attorneys, including Lisa Hobbs, Kennon  
3 Wooten, Martha Newton, who continues to be his right hand,  
4 and Jackie Daumerie, and then, in addition, Lee Parsley,  
5 Jody Hughes, Justice Bob Pemberton, Chris Griesel, Marisa  
6 Secco, and so quite a number of people that have helped  
7 him lead this group and have gone on to continue to devote  
8 their time to the projects that we have, and we're  
9 grateful for that, and we're grateful that you inspire  
10 people to want to do this work, because it can be -- as  
11 Chip mentioned, it can be contentious at times and also  
12 daunting.

13                   So, yesterday, in sort of the week -- I  
14 guess I should start back about a year ago when Justice  
15 Jeff Boyd, who was a deputy liaison to this committee once  
16 upon a time, got all of us except the Chief together and  
17 said, you know, "What are we going to do? I think, you  
18 know, we need to start planning how we're going to  
19 celebrate this great man who's done so much for the legal  
20 profession." And he dubbed it Operation Hail to The  
21 Chief, and I think that the operation has been successful  
22 in that we are routinely embarrassing him at various  
23 things over the last couple of weeks, but in particular,  
24 yesterday was Chief's last oral argument; and Justice  
25 Lehrmann made a few comments, but what might be of

1 interest to this Court is that he has presided over -- not  
2 this Court, this august body. He has presided over 2,779  
3 oral arguments, and yesterday we presented him with a --  
4 not just one volume, seven volumes, a compendium of all of  
5 the opinions he's ever written; and if you were to stack  
6 it on this table, it would be taller than I am, like this  
7 tall. Of all the good work that he's done for the State,  
8 Justice Young says that it is over two plus million words  
9 that the Chief has published in his role as justice on the  
10 Supreme Court.

11 MR. JAMES SULLIVAN: And he's already read  
12 all of them, Justice Young has.

13 HONORABLE JANE BLAND: Yeah. Justice Young  
14 has read all of them and has committed many, many of them  
15 to memory, and he will continue to be the repository for  
16 all things related to Chief Justice Hecht's writings.

17 So, you know, I say all of this to say that  
18 it's sometimes worth taking a minute to celebrate someone  
19 who's done so much for all of us and each other. So I'm  
20 done.

21 (Applause)

22 CHAIRMAN BABCOCK: All right, thank you,  
23 Justice Bland. That was terrific, as always.

24 Well, we now have, I think, our fourth Deep  
25 Thoughts meeting in advance of the legislative session.



1 We started this sort of on an ad hoc way. I don't think  
2 we called it Deep Thoughts the first time, and then I came  
3 up with the idea, which Justice Bland told me this morning  
4 she believes -- she thinks is whimsical and -- what other  
5 word did you use?

6 HONORABLE JANE BLAND: Amusing.

7 CHAIRMAN BABCOCK: What?

8 HONORABLE JANE BLAND: Amusing.

9 CHAIRMAN BABCOCK: Amusing. I prefer  
10 whimsical to amusing, but in any event, the idea was to  
11 get the finest minds in this state, regarding the civil  
12 justice system, together and talk about what we could do  
13 to improve the justice system in the state and to call in  
14 and invite people of -- like James Sullivan, who is here  
15 from the executive branch, and others from the legislative  
16 branch, and then, as you may recall, two years ago we had  
17 Dr. Phil was here, and a guy from the *New York Times* was  
18 here. So, I mean, we've tried to keep it -- keep it  
19 interesting, but this year, since I've run out of ideas, I  
20 asked Kennon Wooten and Quentin Smith to run this program,  
21 and so they have delved deep, and they have lots of  
22 thoughts, and so I'm going to turn it over to you two.

23 MS. WOOTEN: Thank you, Chip.

24 MR. SMITH: Thank you, Chip. I first just  
25 want to thank James Sullivan, who is the General Counsel

1 for the Governor's office, for joining us today, and thank  
2 my partner in crime, Kennon Wooten, for doing the heavy  
3 lifting in organizing this Deep Thoughts meeting, and so  
4 I'm going to turn it over to her, but we wanted to explore  
5 some of what we've already been talking about, which is  
6 AI, which is coming whether we like it or not, and how it  
7 might affect us.

8 MS. WOOTEN: Thank you, Quentin, and thank  
9 you, again, for opening this beautiful space for the  
10 meeting. I will just say a couple of things before  
11 turning it over to James Sullivan for some remarks.  
12 First, Representative Leach intends to be with us. His  
13 schedule is very unpredictable today, so he will come in  
14 person if he can. If he cannot, he will join us via Zoom.  
15 If he cannot do that, we will say thank you for trying to  
16 him, and so that remains to be determined in terms of his  
17 arrival, and we'll play that by ear.

18 But right now we're very, very fortunate to  
19 have James Sullivan here, and, James, I just want to say  
20 thank you very much. I know you made time in an  
21 incredibly busy schedule to be here, so I'll turn it over  
22 to you to give remarks.

23 MR. JAMES SULLIVAN: Can everybody hear me  
24 up here?

25 MS. WOOTEN: Yes.

1 MR. JAMES SULLIVAN: Okay, great. Well, I  
2 don't know anything about AI. I don't know anything about  
3 brightest minds. I am at the kids table up here, but I  
4 put a tie on for you, Chief, unlike the last rubber  
5 chicken lunch, although the Tex-Mex does sound better; and  
6 there was somebody better who was going to be here with  
7 me, but I'll give my dog ate my homework on that in just a  
8 minute. So, you know, kind of starting just briefly by  
9 looking back, I know the Chief would hate it if I talked  
10 about the Chief, so I'm going to do it, but very briefly.  
11 My boss, Governor Abbott, was quoted as saying something  
12 like "Chief Justice Nathan Lincoln Hecht is the most  
13 consequential jurist in Texas history," and that is the  
14 truth, and Governor Abbott knows, along with that Court  
15 and everything, so, thank you, Chief.

16 And so looking back at some of the stuff  
17 from the executive branch side we have been able to get  
18 done with our legislative partners, who, unfortunately,  
19 aren't here right now, because it would be funnier if we  
20 were sitting like right here and our partners on the  
21 Court, looking back at -- at some big wins from the 88th  
22 Legislature. You know, after Justice Young and I, from  
23 back when we both still had, you know, a job, you know,  
24 where you got, you know, paid, you know, you know, and  
25 lots and lots of others have been working for a decade and

1 more with good legislative partners, with judicial  
2 partners, to get a Texas Business Court created, and it is  
3 an idea whose time has come now, and that is really,  
4 really exciting. I've got -- this was the -- this is the  
5 actual -- the ceremonial that Governor Abbott signed, you  
6 know, HB 19, to get the Texas business court created.  
7 That was a huge lift for the Legislature.

8           Chief Justice Hecht, in his State of the  
9 Judiciary address at the outset of the 88th Legislature,  
10 made clear that the business court and the new Fifteenth  
11 Court of Appeals were priorities to the judicial branch.  
12 Governor Abbott mentioned both of those new courts as  
13 priorities in his State of the State address at the  
14 beginning of the 88th Legislature, and our good -- good  
15 bill authors and sponsors and leaders in both chambers of  
16 the Legislature got it to the desk, and, you know,  
17 that's -- had to get -- we've got to get it to the desk.  
18 We did. The Governor very proudly signed Senate Bill 1045  
19 into law to create the new Fifteenth Court of Appeals and  
20 House Bill 19 to get the new Texas Business Court created,  
21 so that part of it got done.

22           And, you know, now we have had 13  
23 outstanding, truly, truly remarkable lawyers and jurists  
24 accept appointments, notwithstanding the, you know,  
25 judicial undercompensation problems that Chief Justice

1 Hecht also mentioned in his most recent, and probably  
2 every one of them before that, State of the Judiciary  
3 addresses; and, you know, the -- the three justices that  
4 Governor Abbott appointed to the Fifteenth Court, Chief  
5 Justice Scott Brister, you know, Justice Scott Field,  
6 Justice April Farris, and the 10 outstanding business law  
7 experts who were appointed, two apiece, to each of the  
8 five divisions, they have stepped up; and now we are at a  
9 place where, as the Chief mentioned, cases are being filed  
10 in the business court or removed to the business court.  
11 Appeals were transferred over to the Fifteenth Court of  
12 Appeals or are now being taken up there on notices of  
13 appeal.

14                   And so for the Star Wars nerds, you know,  
15 this is, you know, a fully armed and operational battle  
16 station now that is going to help with judicial excellence  
17 in the State of Texas, and with the business court in  
18 particular, you know, Texas is now -- if it were its own  
19 country, it would be a G8 economy. We'll probably pass  
20 France next year and become a G7 economy. Having a  
21 specialized business court, you know, is -- is only going  
22 to help with that; and the enthusiasm, as we've traveled  
23 all over the state with, you know, some of our colleagues  
24 -- you know, Justice Young has been at some of those  
25 things and all of these new appointed judges. It's

1 really, really exciting.

2           Yesterday, the very first oral -- I guess  
3 not oral argument. The first hearing in front of the  
4 Austin division of the Texas Business Court was held over  
5 with our partners in -- I think it was Judge Chu in the  
6 Travis County Probate Court Number 2. Thank you, Judge  
7 Chu, for -- I didn't dress up quite as much as this, but,  
8 you know, your bailiff did not, you know, try to hit  
9 center mass when I went back; and so I was excited to see  
10 Judge Sweeten, my former deputy, up there and doing things  
11 at the level that we expect, with the sophistication, with  
12 the respect, with the, you know, courtroom expertise that  
13 he and all of his other colleagues were out there. And so  
14 that is just so, so gratifying after so many folks,  
15 including a lot of folks, you know, who are in this room,  
16 have worked so hard to get -- to get bills passed, to get  
17 bills signed, to get space for these courts, to get  
18 outstanding jurists and staff attorneys and law clerks and  
19 JA's and everything else. And so when we're looking back,  
20 that is really, really exciting. That's what I talked  
21 about at the last one of these, and so, you know, like  
22 nonpromises made, promises kept, so that's really good.

23           Looking forward to some of the things from  
24 the executive branch side, and I also really look forward  
25 to bugging Chief Justice Hecht about what, you know, the

1 next, you know, the three to seven decades, you know, what  
2 kind of mischief he'll be able to cause when he doesn't  
3 have a day job where he's writing two million words or  
4 whatever it was; and so a couple of different things that  
5 are priorities, at least from the Governor's side. There  
6 is still work to be done. You know, the sausage making  
7 process is one of compromises, and so, you know, the --  
8 you know, the bill, you know, when they were, I think  
9 probably not, advisably, calling them the Texas chancery  
10 courts, since we have jury trial rights all over the place  
11 in our Constitution; but back when Mr. Villalba had that  
12 bill in 2015 session, it has changed an awful lot from  
13 that to what hit the desk, the Governor's desk, in HB 19.

14           And so there's probably still more things,  
15 you know, maybe that wouldn't have done this or that thing  
16 exactly that way, but this is a process of compromise, and  
17 now we're getting proof of concept. As the Chief told  
18 you, these courts are busy. They're doing important work,  
19 and, you know, they are open for business; and so we have  
20 built it; and the business court judges, in particular,  
21 Presiding Judge Grant Dorfman, who the 10 of them chose  
22 from among their number -- but all of them, you know,  
23 Judge Sofia Androque, you know, up in the Dallas and Fort  
24 Worth area, you know, all four of them have been getting  
25 the word out to the business community, what is the

1 jurisdictional grant, what sorts of things can you expect  
2 to get when you have one of your disputes brought in front  
3 of the business court; but there are probably things that,  
4 you know, the Governor's office looks forward to working  
5 with the Legislature to improve.

6                   So we -- you know, we would certainly like  
7 to see the business court have geographic coverage to  
8 cover all 254 counties in this great state. There are  
9 probably things here and there. You know, the hearing  
10 that I sat in the cheap seats for yesterday, and it was a  
11 very complicated jurisdictional dispute, it sounded like,  
12 and there may be tweaks or improvements or expansions or  
13 contractions of the business court jurisdiction that might  
14 make sense to make it do more to make Texas the best state  
15 in America to do business. And so, you know, that's going  
16 to -- you know, that's going to take some time; and it's  
17 going to take some work; but, you know, we're optimistic  
18 that with all of the positive enthusiasm that we've seen  
19 about the Texas Business Court, it's here now; and so  
20 let's make it work and do the thing that it's supposed to  
21 do, which is make sure that everybody that has, you know,  
22 these sorts of, you know, very complex commercial  
23 litigation angles that take a lot of time and can take a  
24 long jury trial or that are going to need a hearing, to  
25 make sure that the statutory basis is as good as it can



1 be.

2           There are also things that may be less  
3 about, you know, the words that get printed on this sort  
4 of a bill and more about the one that when you print it  
5 out, it looks something like this. There's some money  
6 stuff. There may be some capital improvements or funding  
7 things that need to happen. You know, as the Chief  
8 mentioned, with I think he said 54 cases currently pending  
9 in front of the business court and lots of those being in  
10 the Houston division of the business court, I can tell you  
11 that Presiding Judge Dorfman and Judge Androque are --  
12 they have a real appetite for toil, and they're loving it,  
13 and they're not ever going to complain; but as we see how  
14 these things work out and sort out, you know, this is  
15 going to be a continual process of improvement, just like,  
16 you know, the rules are a process of improvement that the  
17 Chief has led for so long with the good help from  
18 everybody here.

19           A couple of other things. You know, one of  
20 the -- one of the exciting things about the Texas Business  
21 Court, because HB 19 did work a number of innovations, at  
22 least in the Texas judiciary, the judges of the business  
23 court are appointed by the Governor and with the advice  
24 and consent of the Texas Senate; and so that was one of  
25 the innovations that is, you know, going to be able to

1 change a little bit the way they are able to do their  
2 work; but another really important innovation is that  
3 HB 19 makes clear that where -- where appropriate, the  
4 business court judges, unlike a lot of their colleagues on  
5 other district courts in Texas, are going to be expected  
6 to and are already writing opinions; and that is going to  
7 do service to bench and bar alike. When appeals go up  
8 from the business court to the Fifteenth Court of Appeals,  
9 those three really smart justices up there are going to  
10 get an opinion from a really smart business court judge,  
11 who has not just thought about it and not just, you know,  
12 shot at the bird and said, "I hope it's a duck," but got  
13 to sit down and say, "I think it's this. I've heard from  
14 the parties. I've been able to meditate on the briefing.  
15 Let's see if it will write."

16           That's going to help the Fifteenth Court,  
17 and, if necessary, on a petition for review, the Supreme  
18 Court, and so that's really good; but it's also going to  
19 be really helpful to -- you know, to the bar to be able to  
20 advise your clients; and it's going to be helpful to  
21 people with, you know, you know, corporate law disputes,  
22 internal governance disputes, anybody that's counseling  
23 that sort of boardroom or C-suite. You know, we lawyers  
24 are just a transaction cost, and this thing is happening.  
25 When is it going to end, I don't know. You know, do we

1 have to keep put this on our 10K's and 10Q's? You do.

2           So now some of that litigation can maybe  
3 even be avoided because there will be a growing corpus of  
4 opinions from the business court judges and from the  
5 Fifteenth Court of Appeals and from the Texas Supreme  
6 Court so that everybody can make their capital allocation  
7 decisions, and they can -- they can organize their conduct  
8 around clearer and ever-improving, you know, explanation  
9 of this is what the Texas Business Organizations Code says  
10 about this or that issue; and one of the things that will  
11 be exciting in the 89th Legislature about that is now is a  
12 good time, as the business court has more companies that  
13 are moving not only their headquarters to Texas, but are  
14 now also thinking about reincorporating and moving their  
15 corporate citizenship to Texas, the -- the already  
16 outstanding TBOC, the Texas Business Organizations Code  
17 that we have, this is going to be a really good  
18 opportunity to say the people's elected representatives in  
19 the House and the Senate and the Governor, who they elect,  
20 none of the judges here, none of the judges on the  
21 Fifteenth Court, and none of the business court judges  
22 want to be up there saying what they would like it to be,  
23 but if there are guardrails that the Legislature has  
24 written down in words that can be interpreted by smart  
25 folks that are just trying to say what the law is, that

1 creates a real opportunity to focus on what sorts of  
2 things could be better about the Texas Business  
3 Organization Code, and you can write your legislator. If  
4 you don't like this sort of thing, write your legislator,  
5 or if there's something we can put in there. You moved  
6 your Fortune 500 headquarters to Texas, let's get that  
7 corporate citizenship down here, too, and so that will be  
8 another that will be exciting.

9           And, you know, one other look to the future  
10 thing, in SB 1045 creating the Fifteenth Court of Appeals,  
11 right now, we have, you know, three justices there, April  
12 and the Scotts, but on September 1 of 2027, the way  
13 SB 1045 is written, the Governor will appoint two more  
14 justices so that they won't always have to be sitting en  
15 banc with every hearing necessarily, although that will be  
16 kind of up to them to decide. And a lot of the  
17 fully-armed and operational Texas Business Court and  
18 Fifteenth Court of Appeals that we have exists, you know,  
19 because of the hard work that everybody here did to get  
20 rules in place for the business court, for the Fifteenth  
21 Court of Appeals; and one of the things that helped to  
22 make that possible -- and this is why I was hoping that  
23 Senator Hughes would be here so he can stab me in the leg  
24 with a pen. There was -- there was a veto that I also  
25 have. I think, Chief, you've seen this one as well, for

1 Senate Bill 2275, which was a bill that had identified a  
2 real problem in the old, you know, pretty, pretty old  
3 statute that creates the -- it's the organic statute for,  
4 you know, the Supreme Court and this -- this advisory  
5 body's rule-making authority, and there was some strange  
6 language in there that if we had been writing it today  
7 probably nobody in this room would have written it that  
8 way; and SB 2275 was one that said there's some tough  
9 stuff in there in subsection (c), let's just go ahead and  
10 get that out of there.

11           And I -- you know, I probably couldn't be  
12 described as the Governor's chief diplomate, but, you  
13 know, was pleased to be able to say this is something that  
14 we'll be able to work on in the 89th legislative session,  
15 all three of the branches working together to say what can  
16 we do to improve that, that subsection, but not just take  
17 it out at a time when we needed all the statutory  
18 authority for all of the good work that the Court and all  
19 of you did to get those rules in place.

20           You know, a couple of other things. You  
21 know, other big picture things, you know, like school  
22 choice and property tax reform. As we go from a G8 to a  
23 G7 economy, we're going to have to think about important  
24 things like water. There are some, you know, public  
25 safety issues, you know, kind of sounding in national

1 security and that sort of thing, but I think that I've hit  
2 my time, and I will always be afraid of that look from the  
3 Chief, so I'll wrap it up there.

4 And I'll hand it over to Dr. Phil again.

5 MS. WOOTEN: Well, I'm no Dr. Phil, but I  
6 will say thank you so much for those remarks, and I don't  
7 know that we have Representative Leach here. Anybody seen  
8 the rep walk in? So we have time, if anybody has any  
9 questions they want to ask of Mr. Sullivan, this is a good  
10 time to do it.

11 MR. JAMES SULLIVAN: Since we're playing --  
12 oh, yes, ma'am.

13 PROFESSOR CARLSON: Do you foresee that  
14 Texas will continue to prioritize specialization in its  
15 courts, or was this a unique situation?

16 MR. JAMES SULLIVAN: I think that the  
17 business courts in one way are unique; and then that's  
18 why, you know, for a decade or more, I mean, Byron Egan  
19 has been working on this stuff, you know, since I probably  
20 couldn't have grown this beard. You know, but  
21 specialization in Texas courts isn't -- it isn't a new  
22 thing. You know, we have family law courts, and we have,  
23 you know, the Chief could speak, you know, more  
24 knowledgeably to all of the different ones that we have.

25 The need for specialized business courts was

1 one that, you know, Governor Abbott, you know, is, of  
2 course, you know, a huge proponent of judicial excellence  
3 and also a huge proponent of making sure that Texas is the  
4 best state to do business in in America, and so that's why  
5 this one took a little bit more, and that's why, you know,  
6 I've got the blue velvet folders and that sort of stuff.  
7 That's why I've been excited to work, you know, with Dean  
8 Chesney over at UT Law School to get some space and some  
9 of the other deans at some of the other law schools, like  
10 dean -- the other body, Dean Ahdieh at A&M Law School in  
11 Fort Worth, because the -- I think that the return to  
12 Texans is going to be high enough, and so I don't know  
13 that they are -- I don't know that the creation of the  
14 Texas Business Court portends, you know, a lot more in the  
15 way of fragmentation, any more than our existing judiciary  
16 already has, to some extent.

17 PROFESSOR CARLSON: Thank you.

18 MR. JAMES SULLIVAN: Yeah. And since we're  
19 playing for time, I, you know, maybe Mr. -- I know I would  
20 not have been able to get on a Zoom or whatever, whatever  
21 it's called, and so, you know, I had hoped to be joined  
22 here by somebody much, much smarter than me, in addition  
23 to Senator Hughes and Mr. Leach, and that's my deputy  
24 general counsel, Trevor Ezell, because I had wanted to  
25 make sure that he got a chance to meet this group. Way,

1 way smarter than me. Between the two of us, we average  
2 one clerkship for Justice Gorsuch, because he clerked for  
3 him twice, and so, you know, I don't want to toot my own  
4 horn, but it's no big deal. I didn't get the bonus, but,  
5 actually, now that I think of it, neither did Trevor  
6 because when he wrapped up his second Justice Gorsuch  
7 clerkship, he and his lovely wife Keena and their, at the  
8 time, three-month-old Ransom, put everything, you know, on  
9 the back of a covered wagon, or whatever, and went from  
10 the Beltway area to move down here to Austin. They're  
11 down in Hays County, too, Chief, because of the  
12 opportunity. He had also -- man, his resume is better  
13 than mine. I should stop saying this.

14           He also clerked for Chief Judge Sutton on  
15 the Sixth Circuit; and he also clerked for my illustrious  
16 predecessor Judge Andy Oldham; and, you know, Judge Oldham  
17 had made clear to him what some of the nonpecuniary  
18 benefits were of working for the greatest lawyer in  
19 America, Governor Abbott, or at least that's my very  
20 biased view; and we were so excited to get him on board;  
21 and he was going to be here to -- to speak to y'all and --  
22 or meet y'all and learn a little bit more about the good  
23 work you do and talk about some of the stuff, you know,  
24 that's exciting for the 89th Legislature, so that's why  
25 I'm not allowed to say really anything more than school



1 choice, property tax reform, water, and NatSec.

2                   So I'm happy to try to answer any other  
3 questions, but if I start shucking and jiving, that's --  
4 you know, I would be carrying his bag and my brain would  
5 be sitting right there.

6                   MS. WOOTEN: We don't want you to have to  
7 engage in shucking.

8                   MR. JAMES SULLIVAN: Oh, you've seen me  
9 dance.

10                  MS. WOOTEN: We'll go ahead now, if it's  
11 good for the Chair, and shift gears to our first  
12 presentation by Judge Grimm, who is with us remotely. Is  
13 that all right?

14                  CHAIRMAN BABCOCK: Absolutely. Let's do it.

15                  MS. WOOTEN: Okay. So Judge Grimm, you all  
16 are probably familiar with from our last meeting. He was  
17 referenced many times in the meeting materials we had.  
18 He's the David F. Levi Professor of the Practice of Law  
19 and Director of the Bolch Judicial Institute at Duke Law  
20 School. He served as a federal district court judge in  
21 Maryland for 10 years, and before that for approximately  
22 15 years he served as a magistrate judge. He's a current  
23 member of ALI and was a member of the advisory committee  
24 for the Federal Rules of Civil Procedure between 2009 and  
25 2015. He's written extensively and taught courses for

1 lawyers and judges in the United States and around the  
2 world on topics relating to e-discovery, technology, and  
3 law and evidence, and again, as we all know from our  
4 materials that we received for the last Supreme Court  
5 Advisory Committee meeting, Judge Grimm is a thought  
6 leader with respect to AI.

7 I got to work with Judge Grimm in preparing  
8 for the meeting today, and I can say that he is also kind,  
9 very kind, to boot. Thank you so much, Judge Grimm, for  
10 being with us here today to talk with us about AI. The  
11 floor is yours.

12 HONORABLE PAUL GRIMM: Thank you, Kennon.  
13 That's a very generous introduction. Usually after an  
14 introduction like that, your best option is to shut up  
15 because you can only go downhill from there, but I won't  
16 do that.

17 I do want to add my congratulations to Chief  
18 Justice Hecht, who I've had a great privilege of working  
19 with on a number of panels and programs. He truly  
20 exemplifies the very best that we can expect from  
21 judiciaries. His reputation and his current -- and what  
22 he has accomplished in his long tenure is worthy of the  
23 legend that is established, and he has -- is an  
24 inspiration for anyone who wants to get an idea about how  
25 a judge should behave himself. So, Chief Justice Hecht,

1 please let me add my congratulations to those that you've  
2 already heard, sir.

3 CHIEF JUSTICE HECHT: Many thanks, Paul.

4 HONORABLE PAUL GRIMM: Now, what I would  
5 like to do is start off with a sort of a definition of  
6 artificial intelligence. Everyone hears about the term  
7 "artificial intelligence," and I think it's helpful  
8 sometimes to keep in mind that there's no one common  
9 definition. The American Bar Association has written this  
10 definition in its formal Ethics Opinion 512, and I have it  
11 up on the screen. I'm not going to -- I'm not going to  
12 actually read it, but, essentially, AI is computer  
13 software that is designed to do things that used to only  
14 be able to be done by a human. We've had AI around for a  
15 long time. The first beginnings of it were back in the  
16 late Forties and early Fifties, and what happens is, is  
17 that AI has a mysterious aspect to it until it gets used,  
18 and then you just call it software. So there was a time  
19 that spell check was considered to be AI and spam filters  
20 and things that operate now that we don't even give a  
21 second thought to. They're all powered by artificial  
22 intelligence. What we mean by that is just computer  
23 software, computer analytics, algorithms, which are just  
24 nothing more than a set of step-by-step procedures that  
25 have to be followed to get to a result.

1           Now, some of these AI software applications  
2 have hundreds of thousands of line of -- of lines of text,  
3 so they can be pretty extensive, but I think that one of  
4 the things that we look at AI and know what it does today  
5 is that it frequently replicates intellectual processes  
6 such as the ability -- apparent ability to reason,  
7 discover meaning, generalize, summarize, and learn from  
8 past experience, self-training. So that's what artificial  
9 intelligence is in a nutshell.

10           The next type of artificial intelligence  
11 that no one was talking about until 2022 or 2023 is  
12 generative artificial intelligence. Now, the ABA ethics  
13 opinion that just came out has a useful definition of that  
14 as well, and the generative AI is a type of AI, so all  
15 generative AI is AI, but not all AI is generative AI; and  
16 what it does and what creates such a potential issue that  
17 I think is within the wheelhouse of this committee to  
18 consider is that it creates various types of new content,  
19 particularly text images, audio, visual, software code in  
20 response to a user's prompts.

21           Now, if you've ever used one of these  
22 generative AI tools -- and there are a lot of them out  
23 there. OpenAI, Google's got one called Gemini. You can  
24 type in a request, a query, and, literally, within seconds  
25 of the time that you hit enter, you get this sort of

1 narrative response that appears to be talking directly to  
2 your question. You could say, for example, "List the 10  
3 most important reasons why Texas should have a business  
4 court," and it would come up with 10 explanations, and if  
5 you looked at them, probably eight at least would be right  
6 on point.

7                   Well, how does it do that? Well, it  
8 analyzes large data sets. These are called large language  
9 models. Some of them look at the entire internet, and so  
10 that's a big source of data. Some information on the  
11 internet is very, very reliable and accurate. Others, not  
12 so much, and what the -- what the tool is doing is, while  
13 it appears to be giving you an answer that it has  
14 essentially researched, pulled together, and given you an  
15 answer that is a correct answer, all it's done is  
16 predicted what words it should put out there to respond to  
17 the query that you have given it based upon the way words  
18 that revolve around that concept appear in the data set  
19 that it is learning on.

20                   Some of these tools are described as  
21 self-learning, meaning that they can look at data and  
22 reach decisions, so to speak, on their own; and the reason  
23 why this type of AI is so important is that this is the  
24 type of technology that can be used to create deepfakes;  
25 and that's what we'll be talking about in my presentation

1 in just a second. So what -- what should a rules  
2 committee be thinking about in terms of whether or not a  
3 rule-making response is necessary for evidentiary issues  
4 that could be associated with AI in general -- in general  
5 and generative AI. In this regard, I had the great  
6 privilege of just writing an article that will appear in  
7 the next edition of the Texas Bar Association's litigation  
8 journal -- litigation committee's journal called *The*  
9 *Advocate*, and it's called "The Deepfake Dilemma," and a  
10 lot of what I'm talking about here is summarized in that  
11 article, about eight or nine pages long when it comes out.  
12 Among other things, it's a great -- great way to deal with  
13 insomnia, if you're having trouble with that.

14           But the Texas Rules of Evidence, as they  
15 deal with the evidentiary issues that we are concerned  
16 about when we're dealing with AI are subsequently either  
17 identical or substantially identical to the federal rules,  
18 so I'm just going to use the federal rule number, and it's  
19 basically the same rule number under the Texas rules. So,  
20 obviously, you're familiar with the type of rules that all  
21 trial lawyers are, relevance and the presumption of  
22 admissibility of relevant evidence, unless a statute or  
23 rule or a Constitution says it's not admissible.

24           We know that there's a balancing rule in  
25 Rule 403 that says judges can decide if evidence should be

1 heard by the jury and decide whether its probative value  
2 is substantially outweighed by the danger of unfair  
3 prejudice. The key evidentiary rules that will be the  
4 most problematic for artificial intelligence evidence of  
5 any kind will be authentication. The authentication rules  
6 found at Rule 901, 902, and 903, they require that for  
7 nontestimonial evidence, evidence not provided by a  
8 witness on the stand, that the proponent must authenticate  
9 it, show that it is what it reports to be. The standard  
10 for doing that, pretty much across the board, is by a  
11 preponderance.

12           That's an important concept to keep in mind,  
13 because that's just slightly better than a coin toss, 51  
14 percent. And the way the evidence rules operate, and  
15 we'll see some of the authentication rules in the next  
16 slide that we're not quite ready to go to yet, but there's  
17 a lot of different ways in which a person can authenticate  
18 their nontestimonial evidence, and the rules just give  
19 illustrations, not exhaustive lists, but just  
20 illustrations, so you literally can create any way of  
21 trying to convince the trial judge that this evidence does  
22 what it reports to do or is what it purports to be.  
23 You're not limited to what's in the rules.

24           There are two very important rules that are  
25 found at the beginning of the Texas evidence rules and

1 also the federal evidence rules that allocate the  
2 responsibility of the trial judge and the jury when it  
3 comes to resolving evidentiary issues. Rule 104(a) is the  
4 one that everyone is familiar with, and that's the rule  
5 that says that the trial judge makes preliminary decisions  
6 about admissibility of evidence, qualification of  
7 witnesses, and the existence of privilege. The trial  
8 judge can consider evidence that's not itself admissible  
9 in making those preliminary decisions.

10           Okay. We all know that, that the judge is  
11 the gatekeeper, but there's another rule, 104(b). This is  
12 one of those rules that if you read it in the abstract,  
13 it's kind of like that old zen saying that if a tree falls  
14 in the forest and there's no one there to hear it, does it  
15 make a noise; and the answer to this is that this rule,  
16 when you read it without context, you kind of shake your  
17 head and say what is it trying to do? What, essentially,  
18 Rule 104(b) says is that when the relevance of evidence  
19 depends upon the proof of some underlying fact, it's  
20 admissible subject to, or conditionally, upon the proof of  
21 that fact. So what does that mean?

22           Well, in the context of artificial  
23 intelligence, and especially potential deepfakes, this  
24 rule becomes critical. It's important to recognize that  
25 one of the great strengths of our country that the



1 founders were absolutely intent on establishing and that  
2 it applies within the states as well, is the power of the  
3 jury to decide factual disputes in criminal and civil  
4 cases; and 104(b) preserves the province of the jury in  
5 deciding disputed issues that have to be resolved  
6 regarding evidence as well as determining the weight of  
7 evidence.

8                   So let me just put this in a very simple  
9 hypothetical. Let's assume that a person gets an  
10 e-mail -- or gets the message, a voicemail message, and  
11 they listen to that voicemail message, and it's a person  
12 they've known for years. They've seen them in person.  
13 They've talked to them on the phone. They know what they  
14 sound like. And that person is making a awful threat  
15 against them, that if they don't do something there's  
16 going to be some sort of a consequence. It's  
17 extortionate. Under the authentication rules, all it  
18 takes it takes is someone familiar with that voice to give  
19 an opinion as to whether or not that's that person.  
20 901(b) (5) says that opinion as to voice is all you need.  
21 I'm familiar with that voice. I know who that person is.  
22 They left that thing. I've authenticated it. 51 percent.  
23 Most judges would say you've got that.

24                   Now, what happens if the person who is  
25 supposedly on that voicemail denies that they made it and

1 has evidence that they didn't? Let's say that they've got  
2 two or three witnesses who were with them at the time that  
3 supposedly was posted on the phone, who say, "No, no, no,  
4 he wasn't at his phone. We were in a meeting, and you're  
5 not allowed to bring your phones in for the meeting,  
6 couldn't have possibly done it." Maybe there's a computer  
7 expert that says, "Well, this is sort of suspicious  
8 sounding to me." Now you've got a situation where the  
9 jury could believe the person who says, "I'm familiar with  
10 that voice, and that's who it is." That's a standard way  
11 of doing it, but they could also believe the denial,  
12 because it's corroborated by other evidence. So now  
13 you've got a situation where the jury could go either way.  
14 It could either accept it and authenticate it, or they  
15 could say "no," in which case it would be excluded.

16           The trial judge is not allowed to make the  
17 final call on admissibility at that time, but rather, must  
18 allow the jury to hear both versions and decide, and the  
19 judge would typically instruct the jury, "Listen, the  
20 plaintiff says that this is the voice of a person they're  
21 familiar with. If you accept that and believe more likely  
22 than not that it's true, you can accept that voicemail  
23 message and give it the weight that you believe it's  
24 entitled to. The defendant denies it and has produced  
25 evidence saying that that's not him. If you believe that

1 that case is more likely so than not, then you must  
2 disregard the voicemail and give it no consideration in  
3 your deliberations." And that, that push here, that  
4 tension between the judge making a preliminary evaluation  
5 and the jury deciding the disputed facts that are  
6 necessary to decide of its relevance, this is the rule  
7 that creates the problem for deepfakes that we're going to  
8 talk about in just a minute.

9           As we approach this process, it's important  
10 to keep in mind the last rule on this slide, which is Rule  
11 102. And the Texas rules are actually more dogmatic, in a  
12 good way, than the federal rules, because what that  
13 basically says is it's the duty of the Courts to interpret  
14 the Rules of Evidence in a flexible way to develop and  
15 promote the future development of the law; and that's  
16 important here, as we'll see as we go to the next slide,  
17 because sometimes some of these issues associated with  
18 artificial intelligence evidence will need technical  
19 expertise before the court to be able to make these  
20 distinctions.

21           So let me run through just a couple of  
22 prominent examples of authentication that the rules allow  
23 that could potentially be used with artificial  
24 intelligence and generative AI. 901(b)(1), a witness with  
25 personal knowledge. So the American who invented the AI

1 could come in there and say, "Well, here's how I wrote the  
2 code, and here's how I tested it. Here's how I checked  
3 the results to make sure that it was right, and that's how  
4 it operates."

5           You could have 901(b)(3), which says that  
6 you can compare a known sample with an unknown sample. So  
7 you may have a output of a computer -- of a AI system that  
8 someone is doubting and whether or not that was produced,  
9 and you could compare known output with challenged output  
10 and look for the similarities to see whether or not you  
11 think more likely than not that it is authentic.

12           901(b)(4) says that distinctive  
13 characteristics or circumstances can authenticate, and  
14 901(b)(9) is a rule that is -- most closely aligns with  
15 what is probably the most useful rule in the existing  
16 Rules of Evidence when we're dealing with AI evidence and  
17 generative AI, and that is proof, more likely than not,  
18 low threshold, that the evidence was derived from a system  
19 or process that produces an accurate result.

20           Now, the current rule uses the word  
21 "accurate," and accurate is important, but accurate is not  
22 sufficient. You're familiar with the phrase that a broken  
23 watch is accurate twice a day. It tells the correct time  
24 twice a day, but it's not reliable. In between it's not  
25 reliable. The better way of looking at this, and I

1 have -- Professor Maura Grossman from Waterloo University  
2 and I have made some proposals to the Federal Evidence  
3 Rules Committee about how they might want to tweak this  
4 rule.

5           The better concept would be reliability and  
6 validity. Reliability means that -- or, excuse me,  
7 validity means that this system proves as an accurate  
8 result, and reliability means it consistently produces  
9 accurate results when applied to similar data sets, and  
10 those two concepts are discussed whenever you get into  
11 scientific and technical evidence. The scientists  
12 distinguish between validity, which we can equate to  
13 accuracy, and reliability, which we can equate to  
14 consistent accuracy when applied to similar data sets.

15           The federal rules have two new, fairly new,  
16 rules adopted in 2017 that deal with certified --  
17 certifying copies of records generated by an electronic  
18 system or process shown to produce an accurate result.  
19 That's just a subapplication of Rule 901(b)(9). That's  
20 that same system or process rule, and 902(14) allows  
21 certified copies of data copied from electronic device,  
22 storage mediums, or files.

23           The reason I think that Rule 102 in the  
24 Texas rules and the federal rules becomes important when  
25 we're trying to apply it to this new data in artificial

1 intelligence and generative AI is that we're really  
2 talking about computer-generated output that's being  
3 offered into evidence, and the ability of an AI system to  
4 do what its developer promises it will do, predict whether  
5 this person is a good credit score, predict whether or not  
6 this case is likely to be resolved for the plaintiff or  
7 the defendant based upon prior opinions, predict which  
8 employee that has applied for a job position is actually  
9 the most qualified for it, predict who qualifies for  
10 certain benefits or other government assistance, predict  
11 whether or not certain things will happen with regard to  
12 the weather or certain economic cycles. All of these  
13 kinds of outputs are being used right now in every aspect  
14 that have to do with everything that touches our lives,  
15 and, really, what we're talking about is how do we know it  
16 does what it's supposed to do? And that kind of thing  
17 gets into the realm of scientific technical specialized  
18 information, and that's what Rule 702 says is the province  
19 of experts.

20           Well, AI is not a human expert, but the  
21 principles that are available to test whether or not human  
22 experts can give opinion testimony are the same principles  
23 that would apply to whether or not you can show that  
24 artificial intelligence is a result of a product that  
25 produces reliable results. So we know about whether it's

1 been tested, what's the data that you trained it on, how  
2 did you test it, how do you know, what's the error rate.  
3 If it's 60 percent accurate but 40 percent inaccurate,  
4 does that make the evidence questionable, and should you  
5 admit it? Does it make it excessively prejudicial? It  
6 depends.

7                   So we can borrow from these other rules to  
8 try to apply it, and the question then becomes whether or  
9 not we need bespoke rules, do we need new rules to deal  
10 with AI and deepfakes, and there's a big deal of debate  
11 going on at this particular time. Before talking about  
12 what deepfakes are and why we might want to consider a  
13 rule to address this type of problem that's a somewhat  
14 unique evidentiary problem, you need to keep in mind that  
15 the Rules of Evidence in the Texas rules and the federal  
16 rules, they are typically technology neutral, for a very  
17 good reason.

18                   When I was on the civil rules committee, we  
19 spent almost 10 years working on a set of new proposals to  
20 the Rules of Civil Procedure to deal with electronic  
21 evidence, and it's not unusual for a proposal for a rule  
22 to take two, three, maybe even four years to get across  
23 the finish line in the federal system. Now, I'm quite  
24 convinced that in Texas you-all probably are able to move  
25 a lot quicker than that, but even if you're faster than

1 the federal rules committee, based upon the comments that  
2 I've heard here, you listen to them carefully, you propose  
3 them, the Court considers them, there may be a period of  
4 public comment. That takes time, and so the Rules of  
5 Evidence are typically technology neutral.

6           The question then becomes is there something  
7 about AI or generative AI that creates a problem where we  
8 might want to consider some change to the rules to deal  
9 with it, and that's what takes us to the next slide, which  
10 is deepfakes. Now, the terms that we want to keep in  
11 mind, deepfakes or near fakes or cheap fakes, these are  
12 especially problematic, given the growth of generative AI  
13 tools. We weren't talking about deepfakes earlier than  
14 2017. That's the first time that phrase was used, and it  
15 was used by a person who was on a social media platform  
16 using that as their name, Deepfake, and what they did is  
17 they had a computer system that they had developed, and  
18 it -- it took a picture, the image of a face of a movie  
19 star, and it superimposed it on the face of an adult film  
20 actor; and it was kind of crude, both literally in terms  
21 of the content, but also in terms of the quality of the  
22 video; and it was put out there, and it was a way of  
23 putting a face of some famous actor or actress on the face  
24 of an adult film star.

25           Because it was put out on the internet, all



1 kinds of other folks started looking at it and said we can  
2 improve it here and make it more realistic there, and  
3 before you know it, generative artificial intelligence,  
4 you now have synthetic images and audio and audiovisual  
5 that is so realistic that even computer experts are having  
6 a very difficult time determining whether it's real or  
7 whether it's fake. And the reason why this is so  
8 significant, the federal rules committee, when they were  
9 considering this, said, well, you know, judges have been  
10 dealing with fakes forever, fake signatures, fake records,  
11 fake texts and e-mail or text message. Judges are good  
12 about doing that.

13           I agree, but what's difficult about this  
14 type of fakery, is that, to fake a signature, you had to  
15 have a certain amount of skill. To fake a document, you  
16 had to have a certain amount of skill. The deepfakes are  
17 now something that, given the tools that it takes to make  
18 a deepfake, we have literally democratized fraud. At  
19 little or no cost, any person, any person with a computer,  
20 can go on the internet and find a site that will allow you  
21 to make these fakes, and all they need is about 90 seconds  
22 of actual visual or audio or audiovisual of a real person,  
23 and they can then input that into the software and type in  
24 the text that they want that person to be saying, and it  
25 will produce an audio or audiovisual that is so realistic

1 these days that some of the tells that used to exist, the  
2 pauses, the monotone kind of cadence, all of that is  
3 being -- is being taken care of. It appears as though the  
4 person is actually talking. It is especially difficult in  
5 audio to tell legitimate from not legitimate.

6 Well, why do we care? You know, can't  
7 juries figure that out? Can't the juries decide if it's  
8 fake or not fake, particularly if they hear both versions,  
9 the person denies it and the other person says it's real?  
10 Well, psychological studies have shown us that there's  
11 something about visual and audio that makes it more  
12 challenging for juries. There's a recent law review  
13 article that's -- that came out, and it's called "*Once the*  
14 *Jury Sees It, the Jury Can't Unsee It: The Challenge*  
15 *Trial Judges Face When Authenticating Video Evidence in*  
16 *the Age of Deepfakes.*" That's from 29 *Widener Law Review*  
17 171, came out in 2023.

18 Here's a quote from that law review article  
19 that captures this point as to why deepfakes present a  
20 somewhat unique evidentiary issue. Here's the quote:  
21 "The dangerousness of deepfake videos lie in the  
22 incomparable impact these videos have on human perception.  
23 Videos are not merely illustrative of the witness'  
24 testimony, but often serve as independent sources of  
25 substantive information for the trier of fact. Since

1 people tend to believe what they see, images and other  
2 forms of digital media are often accepted at face value.  
3 Regardless of what that person says, the ability to  
4 visualize something is uniquely believable. Video  
5 evidence is more cognitively and emotionally arousing to a  
6 trier of fact, giving the impression that they are  
7 observing activities or events more directly." And that's  
8 the challenge here.

9           If a -- if a jury hears what appears to be a  
10 voicemail message, and it's menacing, it's threatening, it  
11 is shocking, and it goes to the key issue of a case,  
12 whether or not this was an extortionate message, that even  
13 if there is evidence that it may be fake and that the  
14 evidence that it is genuine is only 51 percent, they may  
15 doubt that it's real, but now it has transformed the way  
16 in which they look at the underlying evidence; and we  
17 create some problems now, because we have a heads and a  
18 tail of a coin, neither side of which you want to get when  
19 it's flipped.

20           You've heard of the liar's dividend. That  
21 is the ability of someone to try to diminish the jury's  
22 willingness to accept a true audio or visual by saying,  
23 "That's a deepfake, you know that. Everybody knows there  
24 are deepfakes out there. You can't trust anything you see  
25 anymore." And the jury says, "Yeah, you know, that may be

1 right, so even though they say it's true and they have  
2 witnesses who say that's really the person, I'm not going  
3 to give that any weight." It's called liar's dividend.

4           On the other side, the deepfakes are getting  
5 so believable and so hard to detect that you have a real  
6 risk that juries will believe that something is legitimate  
7 when it's not, and these fakes are not going to be some  
8 tangential issue in a case. They're going to go to did  
9 that person assault someone, did they say this comment,  
10 did they make this statement, did they do these kinds of  
11 things, and deepfakes have already appeared in ways which  
12 were very convincing. There were some deepfakes that were  
13 used in the primaries trying to convince voters not to go  
14 out and vote.

15           The Russians, who have perfected deepfake  
16 technology, tried to use them in the -- in the elections  
17 in Slovakia about five or six years ago and actually came  
18 out with fake messages that appeared to show one of the  
19 candidates saying some awful things, reprehensible things,  
20 that came out just a day before the election, and there  
21 was no way that the -- the election officials could  
22 respond and try and debunk it in time.

23           So that becomes the particular threat that  
24 this technology gives us, is technology is available at  
25 little or no cost, easy to use, hard to detect; and it's

1 the kind of thing that when it's presented to a jury, the  
2 jury is going to have to deal with whether or not they can  
3 adequately or accurately discern as to whether or not it  
4 has been authenticated in a way that they can rely upon  
5 it.

6           So let me put this in an evidentiary  
7 context. We really face three scenarios. Let's assume  
8 that we have my little voicemail hypothetical again, and  
9 the plaintiff says, you know, "That's the voicemail of  
10 so-and-so. I know it very well. They left it on there,  
11 and this is what it says." Now, the judge gets an  
12 objection, and the opposing party just says, "Objection,  
13 insufficient foundation." Judges can deal with that.  
14 They deal with that all the time. They may say, "Counsel,  
15 why don't you lay a little bit better foundation for  
16 that," or they may just say, "Overruled."

17           Now let's say you have an objection that  
18 goes like this: Proponent offers the voicemail. The  
19 defense counsel gets up and says, "Objection, Your Honor.  
20 You've heard of deepfakes. You know that this kind of  
21 synthetic media is out there. How do we know that it  
22 wasn't prepared by a computer? How do we know that it  
23 wasn't fake information? We can't really rely upon that.  
24 I object." Now, there are no facts that have been given  
25 to the judge to allow the judge to weigh those facts

1 against the authenticating facts that a person who is  
2 offering the voicemail has said. So those are what I  
3 refer to as the lions and tigers and bears objections.  
4 There's no facts to support the judge making a ruling,  
5 just an objection that has a little bit of argument and  
6 speculation in it, not just a pure legal conclusion.

7           This situation number three at the bottom is  
8 the one that presents the problem. Here, the proponent  
9 offers evidence from which a jury could reasonably find  
10 that the evidence is authentic. That's the "I know that  
11 person's voice, and that's their voice." Now, the  
12 opposing party offers evidence from which a reasonable  
13 jury could also find it's fake. So it could go either  
14 way. Jury could say by a preponderance it's a fake, could  
15 say by a preponderance it's legitimate. So in that  
16 scenario, what do we do?

17           And the next slide shows us what we've just  
18 talked about just a second ago, and that is the judge  
19 makes a preliminary decision, do I agree that there's  
20 enough evidence that the jury could find more likely than  
21 not that that's the voice of the person that the proponent  
22 says it is, and do I believe that there are facts from  
23 which the jury could find that it's not? If the judge  
24 says both of those are possible, then the judge has to let  
25 the jury hear the evidence and then decide whether or not

1 they think it's the voicemail of the person that it's  
2 claimed to be or not. If it's not the voicemail, then  
3 it's not authentic. If it's not authentic, it's not  
4 relevant, and it shouldn't be considered, but in this  
5 situation where there are competing facts and the jury  
6 could go either way, the current rules require that the  
7 jury hear the dispute. But if it's a deepfake and you've  
8 got that very emotional type of content that could be the  
9 most decisive determination of the case, then you've got  
10 the problem of prejudice.

11           So how do we deal with this issue? And this  
12 is what the deepfake dilemma is; and that's because when  
13 we go to Rule 403, the balancing rule, the introductory  
14 language to Rule 403 says relevant evidence may  
15 nonetheless be excluded if its probative value is  
16 substantially outweighed, but the danger of unfair  
17 prejudice, delay, misleading the jury, or it's  
18 unnecessarily cumulative. Note the importance of that  
19 word "relevant evidence." Evidence isn't relevant if it's  
20 not authentic, so you have to have the issue of  
21 authenticity decided, at least under the current Rule 403,  
22 before the judge gets the opportunity to say I'm now going  
23 to balance to see whether it's unfairly prejudicial. This  
24 is the catch-22 that exists in the existing rules. And  
25 the next slide --

1                   PROFESSOR HOFFMAN: Judge Grimm, can you  
2 hear me?

3                   HONORABLE PAUL GRIMM: -- continues on this  
4 discussion. If the jury's got to see the contested  
5 evidence to determine authenticity, then they may not be  
6 able to disregard the evidence, even if they're convinced  
7 that it may not be genuine. That's the thesis of that law  
8 review article and some other studies that have been done  
9 on this. 403 balancing, at least according to the current  
10 rule, is limited to relevant evidence, and inauthentic  
11 evidence can never be relevant. There is a possible way  
12 that this could be addressed, not in the rules and not in  
13 the advisory comments, by looking at two decisions, one  
14 by United States Supreme Court in the Huddleston case and  
15 one by the Third Circuit in the Johnson case, where the --  
16 looking at a different Rule of Evidence, namely 404(b),  
17 other crimes, wrongs, and acts, in the Huddleston case,  
18 and Rule 415, which is one of the sexual predator rules of  
19 the federal rules in a civil case.

20                   And the judges said, well, you know, one  
21 side wants to offer this evidence of other crimes, wrongs,  
22 or acts. The other side objects. Does the judge have to  
23 decide whether the other crime, wrong, or act actually  
24 occurred? No, the judge just has to decide if the jury  
25 could decide if it occurred, and if a jury could, the



1 judge doesn't have to preliminarily decide it, just let it  
2 go to the jury, and the jury can decide. But then the  
3 Supreme Court said in Huddleston, but we agree with the  
4 parties that are concerned about this that that could be  
5 unfairly prejudicial, so the judge can use Rule 403.

6           Now, I'll be honest with you, I don't know  
7 that the federal evidence rules committee agrees with my  
8 reading of these cases, but I've read them a few times,  
9 and I think that they support the argument that I'm  
10 making, that if you've got to use the existing rules, then  
11 I think that the Huddleston case and the Johnson case in  
12 the federal system, at least, give authority for the trial  
13 judge, if you had that tomato/tomato, it could be  
14 authentic, it could not be authentic, but if I let it go  
15 to the jury, I'm afraid that it's so dynamic or powerful  
16 that even if they don't think it's real, they're not going  
17 to be able to forget it, and it's going to create a  
18 problem of unfair prejudice, and so I'm just not going to  
19 let it go to the jury. I'm going to exclude it.

20           I believe that these rule -- that these  
21 cases are analogous enough to where you could apply  
22 Rule 403, but not everybody agrees with me, which is why  
23 my -- my colleague, Professor Grossman and I, decided that  
24 we wanted to offer a rule that would specifically deal  
25 with this.

1           So what did we go to the rules committee  
2 with? We thought that you really need to have considered  
3 two rules. One rule is when you're dealing with evidence  
4 that everybody agrees is artificial intelligence, there's  
5 no dispute that it is AI, then it would be helpful to have  
6 some rule that tells you how you can prove that it is the  
7 result of a system or process that produces an accurate  
8 result, and you could do that very simply by a small  
9 amendment to Rule 901(b)(9).

10           901(b)(9) says if it's the result of a  
11 system or process that produces an accurate result, it's  
12 authentic, and we suggest -- and we'll show you the  
13 proposed rule in just a second -- that a slight little  
14 additional language in another subsection would have a  
15 special section that's saying, look, if we all agree that  
16 this is artificial intelligence, a way that it is  
17 sufficient to authenticate it, not that you have to, but a  
18 way that is sufficient, is to describe the software, how  
19 it was trained, and to produce information to show that it  
20 produces both reliable and valid results; and so you go  
21 ahead and do that, and that's sufficient.

22           The idea being that if you give an example  
23 that deals directly with artificial intelligence as a  
24 permissible way to do it, then lawyers who want to get  
25 this evidence in will be encouraged to use that rule

1 because the rule says, hey, if I do this, that's enough;  
2 and lawyers who don't do that, who try to come in and  
3 can't make that showing, the judge has an ability to hear  
4 an objection and go back in and focus in on whether or not  
5 there's a problem there. That's a rule that deals with  
6 acknowledged evidence. Not that you have to do it this  
7 way, but that this is sufficient, and that's an  
8 encouragement to do it in a way that would get the  
9 foundation to the judge to be able to make the right call  
10 with this highly technical type of evidence; but the  
11 deepfake presents a fundamental problem that's somewhat  
12 unique; and the deepfake, one side says, "This is just a  
13 voicemail. We all know what a voicemail is. This is not  
14 some computer-generated nonsense. It's a voicemail  
15 message. You listened to it on my phone."

16           And the other side says, "No, it was  
17 generated by a computer. It altered or it fabricated the  
18 content, and we can't keep that in." So now you've got a  
19 dispute about what we are really talking about, the  
20 essence of the underlying evidence; and that's where you  
21 need to have a rule that deals with deepfakes; and you  
22 can't have a rule called "the deepfake rule" because five  
23 years from now they'll be calling it something else. So  
24 what did we propose to the federal rules advisory  
25 committee?

1           On the screen in front of you, you'll see  
2 what we proposed. The bold font is new text. That's  
3 the -- that's the new language that Professor Grossman and  
4 I suggested should be considered by the federal rules, and  
5 the -- the 901(b) already says the following, and there  
6 are 10 that come after 901(b), are examples, not a  
7 complete list of evidence that satisfies the requirement  
8 of authentication. 901(b)(9) is that rule that we just  
9 talked about, the system or process that produces an  
10 accurate result. What we would suggest, what we suggested  
11 to the evidence rules committee, is there be an (a) and a  
12 (b).

13           The (a) is the existing rule, but we would  
14 tweak it. Evidence describing it, the system or process,  
15 and showing that it produces -- the current word is  
16 "authentic." We would say "valid and reliable," and then  
17 (b) is the new language that we suggested as a way of  
18 showing that you could sufficiently authenticate  
19 artificial intelligence evidence that you acknowledge is  
20 AI generated, and that says "If the proponent acknowledges  
21 that the item was generated by an artificial intelligence,  
22 additional evidence that, one, describes the training,  
23 data, and software or program that was used, and, two,  
24 shows that they produced a valid and reliable result in  
25 this instance."

1           So what the evidence was would be -- depend  
2 upon the nature of the particular system, but it would  
3 have a way that was just a modest addition to an existing  
4 rule that said, hey, you know, if you look at 901(b),  
5 you've got how do you authenticate voicemail or a person's  
6 voice, how do you authenticate a telephone number, how do  
7 you authenticate a public record. So they've got specific  
8 examples of authentication that deal with specific  
9 evidentiary situations. It's not a big lift to be able to  
10 have one that just talks about artificial intelligence and  
11 says, if you agree it's artificial intelligence, do this,  
12 that's sufficient, like all of the other rules; and now it  
13 encourages the people who want to do it the right way to  
14 follow that; and it gives a basis for analysis to judges  
15 and lawyers who want to challenge someone who hasn't done  
16 that.

17           So that's the first rule that we suggested.  
18 The next slide is the new rule that I will call the  
19 deepfake rule, and I'm going to go through it line by  
20 line. The rule is an all-new rule because it's in bold,  
21 and it says, "Potentially fabricated or altered electronic  
22 evidence. If a party challenging the authenticity of  
23 computer-generated or other electronic evidence  
24 demonstrates to the court that a jury reasonably could  
25 find that the evidence has been altered or fabricated, in

1 whole or part, using artificial intelligence, the evidence  
2 is admissible only if the proponent demonstrates that its  
3 probative value outweighs its prejudicial effect on the  
4 party challenging the evidence."

5           Now, let me unpack that a little bit. The  
6 first thing that this does is it's limited to fabrications  
7 by computer-generated evidence, and so it's limited to  
8 artificial intelligence evidence. We don't want to have a  
9 rule that every time someone says that a signature is a  
10 fake signature, you've got to shift the way the balancing  
11 rule is. This is a rule designed to deal with a problem  
12 that is, by definition, associated with artificial  
13 intelligence evidence only. So the way the rule operates  
14 is it has some key features, the way we designed it.

15           Number one, it doesn't say anything about  
16 what the proponent has to do to make their initial burden  
17 to authenticate. They can do it any way they want.  
18 They're free to do it any way in 901, 902, or any other  
19 way they want. They have complete freedom.

20           Number two, it puts the burden on the party  
21 challenging it as fake to do more than just object or say,  
22 how do we know this wasn't created by a computer? They  
23 must show the trial judge that, more likely than not, or  
24 that there's evidence from which a jury could conclude  
25 more likely than not that it's fake, so they've got to

1 have evidence. What would that be? It could be other  
2 corroborating evidence that it wasn't legitimate, could be  
3 an expert witness, could be all kinds of stuff. Gives  
4 them the freedom to come up with it, but they have to have  
5 facts.

6                   What then happens, well, then the proponent  
7 will have an opportunity to say, well -- well, let me show  
8 you why, even with what they have said is whatever  
9 probative value it has is more than its prejudicial  
10 impact. Now, that's a balancing rule. It is not  
11 Rule 403, because Rule 403 says if the probative value  
12 must be substantially outweighed by the danger of unfair  
13 prejudice, so the more probative it is, the harder it is  
14 to show the prejudice, and deepfakes are going to be very  
15 probative. They're going to go to the key issues in the  
16 case, so you can't have that rule. You can't have that  
17 balancing test, so where do we come up with this balancing  
18 test?

19                   It is an existing rule. If you go -- if you  
20 look at all the Federal Rules of Evidence, and I suspect  
21 the Texas Rules of Evidence as well, there are -- there  
22 are at least three separate balancing tests that have been  
23 used. Number one is Rule 403 that tees towards  
24 admissibility. You also find a rule in Rule 703 of the  
25 federal rules, for example, or Rule 412(b)(2) that says

1 that for certain types of evidence it is automatically  
2 excluded, unless the proponent shows that its probative  
3 value is much greater than any prejudice, and that tilts  
4 against admissibility. That's not the test that we're  
5 offering.

6           The test that we're offering is currently  
7 found in evidence Rule 609(a)(1)(b), and that's what  
8 happens when you're trying to impeach a criminal defendant  
9 in a criminal case. You're trying to impeach that  
10 defendant with their prior felony conviction, and the  
11 federal rules say you shouldn't have 403, because then  
12 witnesses -- then the defendant is not going to testify.  
13 It's too hard to exclude it, and you shouldn't exclude it  
14 all the way because this could be very important for jury  
15 credibility assessments, so we're just going to say that  
16 if it's -- whatever the pros and cons of admitting this  
17 are for credibility, if it's still more probative than it  
18 is prejudicial, then that's enough; but if it's slightly  
19 more prejudicial than probative, stays out. Why is that  
20 important? Because the judge makes the balancing call,  
21 not the jury.

22           So in this particular proposed rule, they  
23 would be limited to the situations where someone has  
24 offered evidence. They chose their own authentication  
25 methods. The opposing side has come forward with evidence



1 from which the judge -- the judge doesn't have to make the  
2 call that it is fake, just say could a jury find from this  
3 evidence that it is, then it is excluded, unless the  
4 proponent comes back and shows where else they said it's  
5 still more probative than prejudicial. How might they do  
6 it? With corroborating evidence. You've got that  
7 voicemail message of Grimm? Well, I'm going to  
8 corroborate because I've got a witness that heard Grimm  
9 say, "I really showed that person. I called them up last  
10 night, and I told them if they didn't give me a million  
11 dollars I was going to expose that they've done X, Y, and  
12 Z." I've got corroborating evidence. Could be a fake,  
13 but I've got a corroboration. It's still more probative  
14 than prejudicial. It comes in.

15           The key to this rule is the judge makes the  
16 call. It avoids the deepfake dilemma. It avoids the  
17 catch-22 where the judge has to let the jury hear it in  
18 order to decide whether they think it's authentic or not.  
19 And that's the rule and the justification that we offered  
20 to the evidence rules advisory committee.

21           Now, let me just say that our presentation  
22 to the evidence rules advisory committee was a complete  
23 success in all regards except for outcome, because at that  
24 meeting, they said, "Well, we don't think we need a  
25 special rule for authentication, and we don't think we

1 need a deepfake rule, but what we're going to do is we're  
2 going to authorize the reporter for the evidence rules  
3 advisory committee" -- he's Professor Dan Capra from  
4 Florida Law School. He's the reporter for the evidence  
5 rules committee. He's brilliant. He's a brilliant,  
6 magnificent evidence scholar, and they authorized him to  
7 come up with a particular rule that the -- that the  
8 committee could have in its back pocket.

9           The committee was not convinced that these  
10 deepfakes were as problematic as I think that they are;  
11 and they said, well, let's wait and see, but in the event  
12 that it turns out that judges are struggling with this  
13 stuff, let's have one in the waiting room so that we can  
14 bring it out and then put it out for public comment; and  
15 so on the next slide, you'll see the -- I guess, one more  
16 slide, please. The next slide is what the -- the most  
17 recent evidence rules advisory committee proposed.

18           Now, you'll see that the introductory  
19 language is the language that Professor Grossman and I  
20 authored, so we at least did persuade them that our  
21 language was useful. So the proposed rule that the  
22 evidence rules advisory committee is going to consider --  
23 they haven't committed to do this, but they're going to  
24 consider coming up with this proposed rule, putting it on  
25 the shelf, waiting to see what happens as judges are

1 dealing with this evidence; and then in the event it turns  
2 out that there's problems, bring it on out, put it out  
3 there for public comment, and see if they see -- see if  
4 that -- see if that flag is one that people are willing to  
5 salute.

6                   So it starts off with the language that  
7 Professor Grossman and I proposed. "If a party  
8 challenging the authenticity of computer-generated  
9 evidence or other electronic evidence demonstrates to the  
10 court that a jury reasonably could find that the evidence  
11 has been altered or fabricated, in whole or in part, by  
12 artificial intelligence," or alternative language, "by an  
13 automated system." That's the language that we propose.  
14 Then here's what the evidence rules said -- committee  
15 said. Well, let's try this as an ending instead of what  
16 Grimm said. "The evidence is admissible only if the  
17 proponent demonstrates to the court that it is more likely  
18 than not authentic."

19                   Now, initially, you might read that and read  
20 what we proposed and say, well, they're the same thing,  
21 what's the difference? But the challenge I have that may  
22 be a potential problem with this language is that the  
23 judge is only required -- I like the fact that the judge  
24 makes this call. We're not talking about the jury, but  
25 the judge is only required to -- to require that the

1 proponent show more likely than not that it is authentic,  
2 and that's by a mere preponderance. It doesn't address  
3 what happens if the evidence is split. It could go either  
4 way, so the evidence would be sufficient if the jury  
5 considered it more likely than not authentic. That would  
6 be enough for the jury to do it. They could do that, but  
7 it could also be enough that they wouldn't. Under those  
8 circumstances, the rule doesn't address the catch-22.

9           The rule that we did, does address it,  
10 because it says when you have that evidence of synthetic  
11 creation, that it's not legitimate, and the other side  
12 comes back in, it doesn't come in unless it's more  
13 probative than prejudicial. Not that it's more likely  
14 than not authentic, because that likelihood is only by a  
15 preponderance of evidence. So I think that this is  
16 helpful to discuss, but it doesn't address that catch-22  
17 problem that currently exists under the rules. That's why  
18 Professor Grossman and I made the suggestion that we made,  
19 that you have a separate balancing test, and we were  
20 trying to use an established balancing test that's already  
21 in the rules, so obviously it's been considered to be  
22 acceptable for certain circumstances, and apply it here,  
23 as a rule of fairness.

24           The key to this is that it would solve that  
25 problem with Rule 403 that says that you have to first

1 have authentic -- you also have to first have authentic  
2 evidence and relevant evidence in order for you to keep it  
3 out under Rule 403. It can't be relevant if it's not  
4 authentic. Our rule says when you've got that challenge  
5 and a jury could find it's not authentic, judge doesn't  
6 have to make that call, but the judge does then go back to  
7 the proponent and say, "Look, what have you got to deal  
8 with what they say," and then say, "Does the probative  
9 value of that outweigh the prejudice?" If yes, it comes  
10 in, and that allows a rule that is not as restrictive as  
11 Rule 403, allows the judge to deal with it, and allows the  
12 judge to avoid the potential prejudice that can come up  
13 with some of these very, very, very shocking deepfakes  
14 that have already started hitting the -- the case law and  
15 creating some problems.

16           So you've been very generous in listening to  
17 me rave on about this. I'll shut up now, if there are any  
18 questions that you have, and the question then becomes  
19 what should the committee do? Well, the federal folks are  
20 going to wait and see, and -- and oftentimes, that's not  
21 a -- not a bad thing to do. The challenge that -- that I  
22 am concerned about is that this new evidence is out there  
23 now and getting better and better and better and harder  
24 and harder to detect. It is being dealt now.

25           There is an estimate that by the end of next

1 year there will be over eight million deepfakes floating  
2 around on social media. Deepfakes are being used to cheat  
3 people out of their own money. Deepfakes are being used  
4 to try to influence people's voting in cases. Deepfakes  
5 are being done to try to embarrass public figures by  
6 making it appear that they said something that they didn't  
7 say, and deepfakes are really popping up in the kind of  
8 cases where oftentimes judges are confronted with domestic  
9 relations case where the participants are not even  
10 represented by counsel. Someone walks up and says,  
11 "Judge, listen to this voicemail that they left on my  
12 phone. This is why I want an order that gives me a  
13 protective order against them."

14 I think that because these deepfakes are  
15 such a unique type of evidence that it should at least be  
16 considered whether or not a special rule is needed, and I  
17 think on the -- just the AI, it would be really helpful to  
18 have an authentication rule that says, listen, folks, if  
19 you do this, that's enough, because if you build it,  
20 people will use it.

21 Thank you very much for listening to me. If  
22 you have any questions, I would be happy to answer them.

23 MR. SMITH: Thank you very much, Judge  
24 Grimm. We actually do have some questions, and so I know  
25 we have one to my right.

1                   PROFESSOR HOFFMAN:  So, Judge Grimm, it's  
2 Lonny Hoffman, so I'll just quickly say we have  
3 intersected in a number of ways over the years, most  
4 recently because I'm on the subcommittee that's looking at  
5 this issue that the Court has set up, and also, as Judge  
6 Grimm graciously mentioned, I'm the editor of *The*  
7 *Advocate*, and one of our upcoming issues is devoted to AI,  
8 and Judge Grimm and Maura Grossman both have articles in  
9 there for us, so I have been paying attention to these  
10 issues for a bit.

11                   I think my question is, is this -- I think  
12 ultimately my question is what would you think about a --  
13 some kind of a pilot project, if the Court were amenable  
14 to it, prior to us, you know, thinking about adopting a  
15 rule?  So that's sort of ultimately where I'm going, to  
16 get you to kind of see where that is.

17                   The stuff I'll put in the middle would be I  
18 am less confident than you are that judges, even very  
19 smart judges, are likely to fix this problem in the way  
20 that you imagined it would be fixed.  I don't actually  
21 think that that is how our system works or gets better.  
22 Conscientious and honest judges who consider in  
23 nonpartisan ways their jobs is certainly part of it, but  
24 hard problems are hard problems, and I don't think they're  
25 made easier because someone has a resume that demonstrates

1 prior educational expertise. So I have my doubts that  
2 your ideas are likely to make things better, but I'm also  
3 old enough to know that I am more often wrong than right,  
4 and so what do you think about the idea of a pilot  
5 project, if the Court were open to it? Do you think we  
6 could propose something that had different elements so we  
7 could test different aspects of ways to do this?

8 HONORABLE PAUL GRIMM: Professor Hoffman,  
9 that's a great -- a great question. I think pilot  
10 projects are great when you can devise them and sort of  
11 see how it might operate. It gives you the opportunity to  
12 test theory against experience and to sort of see how  
13 things operate before you, you know, bought the whole  
14 ranch and sunk all of your money into it.

15 The things that I -- the things that I think  
16 that you're cautioned about, the limit of rule-making, I  
17 think we have to have a certain level of humility as  
18 rule-makers that -- and I learned that when I was on the  
19 rule committee. We thought we thought of everything we  
20 could, and we went out there and put the rules out there,  
21 and we found that, despite the fact that we had, you know,  
22 orientation programs in 20 different court systems and  
23 states and went out there and the Chief Justice came out  
24 and said, hey, these are really important new rules, 15  
25 years later people are still doing what they did before.



1 So I'm confident that there is a certain limitation to  
2 what rule-making can do. It's got to be -- it's got to be  
3 followed; and if people are already following it, because  
4 you've got a pilot project that does that, then that is a  
5 natural way to write a rule because you have some proof in  
6 success. You've been able to, if you will, empirically  
7 test it. So I think that that's a good thing.

8 I think the problem that I would agree with  
9 you, Professor, is we see the same problem with  
10 scientific, technical, and specialized information. Now,  
11 the federal Rule 702 was just tweaked last year, and if  
12 you -- and the rule itself is sort of agnostic, but if you  
13 read the advisory note in a very gentle and subtle way,  
14 the advisory committee says, "We had to change the rule  
15 because judges weren't doing what we told them they had to  
16 do." It's hard for a trial judge, because, I mean, we're  
17 generalists. If you're trying to look at error rate, peer  
18 review, general acceptance, and whether they are standard  
19 procedures and how they were complied with, and you've got  
20 very sophisticated scientific and technical information,  
21 and the applicants you bring in are very qualified lawyers  
22 who take opposite outcomes, it's very hard to figure out  
23 how to do that.

24 So we've got a really good rule that says,  
25 hey, this is what you've got to do, and everyone says,

1 yeah, if you do that, you got it, but it's -- you know,  
2 the proof of the pudding is in the tasting, and I think  
3 that the experience is they had to change the rule because  
4 for 20 years they thought the judges weren't doing it.

5           So I agree with you that there's a limit as  
6 to what you can do with rule-making. One friendly  
7 amendment I would make to your suggestion, though, is  
8 that, while I think you may be right that, if, for  
9 example, I would -- I would -- could be made the boss of  
10 all evidence rules for one week, and I could put these  
11 rules in, do I think that they would solve a problem  
12 overnight? No, but it wouldn't make it worse. It would  
13 at least have a framework that people could go for, and it  
14 would give the cues to the lawyers to make the arguments  
15 necessary to improve the chances that the judges would get  
16 it right.

17           I have enormous respect for trial judges, I  
18 was one, and they are working under tremendous pressures  
19 and caseloads to try to get it done, and -- and I think  
20 that they're unbelievably important in what they do, and  
21 they work really hard, and they do a really good job, and  
22 the Texas judges I have met are some of the best of the  
23 best, but I also think that having a rule that gives you  
24 at least the right questions to ask is going to increase  
25 the likelihood that you get an outcome, and I worry about

1 the fact that we judges, if we haven't solved the problem  
2 and we're looking at it and we find another judge that has  
3 attempted to solve it and we like that, we just jump on  
4 board. Next thing you know you've got 15 cases marching  
5 in a certain direction, and it may be the wrong direction.

6           Now, that may be a problem in the federal  
7 courts where every trial judge can write an opinion that  
8 gets picked up in the federal rules decisions or on  
9 Westlaw, and people tend to go on about that. It may be  
10 if you don't have trial judges coming up with this body of  
11 law that they create every time they issue an order in the  
12 state system, you would get the more deliberative review  
13 by your appellate judges, and that might be a lesser  
14 chance. But that's a long-winded way of saying I would  
15 have no problem at all and would be delighted to volunteer  
16 any help I might be thought to be able to provide to help  
17 come up with that pilot project, and maybe even get some  
18 others to try to do it, to throw some things out there,  
19 and I can tell you, Professor, that there are some other  
20 things we could do, too, because you could augment these  
21 evidence rules with rules of practice and procedure that  
22 require disclosure by a party who was trying to introduce  
23 artificial intelligence-generated evidence, an opportunity  
24 for the opposing side to get some discovery, and a  
25 deadline for filing any notice of an intent to object.

1 Maryland has got a rule like that that they've had for  
2 computer evidence since the 1990's, and you could come up  
3 with some procedural things that would help the courts as  
4 well in such a pilot project, so long-winded way for me to  
5 say that I have no objection to a pilot project.

6 MR. LEVY: Judge Grimm, this is Robert Levy.  
7 One of the items I wanted to take you back to is when you  
8 were talking about authentication of generative AI, and  
9 you talked about having somebody coming in and indicating  
10 the author of the program, but as I see the -- one of the  
11 problems is, is that under our current authentication  
12 rules, all you need is somebody to say this is a summary  
13 of a meeting that was generated by Copilot or by Teams or  
14 whatever, and that's all that would be required, even if  
15 there's -- it's not clear that that summary of the meeting  
16 is actually accurate and complete, and I'm curious as to  
17 your thoughts about that particular challenge. Not the  
18 deepfake issue specifically, but just the AI becomes  
19 itself its own entity or beast, and how do we know if it's  
20 actually correctly depicting what it's purporting to  
21 depict.

22 HONORABLE PAUL GRIMM: Yeah, Robert, that's  
23 a great question, and I agree with you. If you've ever --  
24 this is an example of it that I could -- that Robert is  
25 making reference to, is that if you're on a Zoom call now,

1 there's a little thing that you can click that, as we're  
2 talking, it will create a transcript. It's amazing when  
3 you see it, and so what happens is if we're at a Zoom call  
4 that occurred last year and we click that little thing on  
5 the Zoom software and it spits out a transcript and it  
6 says that, you know, that Robert Levy said X and Paul  
7 Grimm said Y and someone else said something else, and  
8 it's all right there, and you go in trial and the question  
9 is, well, did Grimm really say that or did Mr. Levy really  
10 say that.

11                   And somebody who was there said, "Well,  
12 yeah, I was there on that call. I don't remember too  
13 much, but I looked at this transcript, and, yeah, I think  
14 that's probably what it said." That's sort of similar to  
15 what happens when someone takes a look at a photograph and  
16 they say, "Does this fairly and accurately represent what  
17 the actual conditions were at that time?" Now, we all  
18 know photographs can be photoshopped. They can be -- they  
19 cannot capture the light right or can be all kinds of  
20 issues, but the way of authentication of that, you're  
21 correct, Robert, is just a witness to say, "I was there.  
22 I listened to what was said. I looked at that -- that  
23 summary, and I think it's correct."

24                   Would that be enough to show more likely  
25 than not that it was correct? Yes. And what would it

1 take to show that it wasn't? Well, someone else who might  
2 have to say, "Well, I was there, and it's not correct,"  
3 and then you might have to get into a situation where how  
4 do we go in there and to deal with that. What -- what you  
5 could take some comfort -- Robert, you and I have had this  
6 conversation before, because it's your -- you're  
7 characteristically very sharp in your understanding of  
8 some of the evidence rules, but remember in the framework  
9 of a business record, the proponent has a certain  
10 obligation to authenticate and establish when it was made  
11 and that it was at or near the time of the event and it  
12 was a regular practice to do it, and that's enough to get  
13 the authentication, but then the -- under Rule 803(6)(E)  
14 then the opposing party has to show come in and show at  
15 that time that the source, method, or circumstances lacked  
16 trustworthiness.

17           You could have a situation, too, is if you  
18 had something like that, you could say, "Well, it's really  
19 just a business record because this thing is generating  
20 right there, it's the regular thing to do," and then the  
21 opponent would have the burden on them to say, "I want to  
22 keep it out. I'm going to show that it lacks  
23 trustworthiness." You'd have to have some discovery in  
24 order to be able to make that attack, but I agree with you  
25 that you -- you're never going to have perfection, but in

1 the situation that you use in terms of that summary  
2 device, I think you're right, that a witness has said,  
3 "Well, I was there, I listened to it or read that, and  
4 that sounds to me like what was said," that would more  
5 likely than not be allowed in, unless some opposing party  
6 has some ability to say, "Well, here's a reason not to  
7 believe it's accurate."

8 MR. ORSINGER: Judge Grimm, Richard  
9 Orsinger. I wanted to ask you about a slightly different  
10 subject, and that is this committee has considered whether  
11 we should adopt new and different rules about recording  
12 and broadcasting trial court proceedings, and some of the  
13 concerns expressed was that testimony of witnesses that's  
14 recorded and put on the internet could be altered so that  
15 they were saying things that they didn't say and whatnot  
16 and how to weigh that danger to witnesses and potential  
17 embarrassment against the public's right to know. Have  
18 you applied any of your thinking or analysis to that issue  
19 about televising court proceedings and allowing it to go  
20 out onto the internet?

21 HONORABLE PAUL GRIMM: Wow, that's a great  
22 question, Mr. Orsinger, really good question. You're  
23 absolutely right. If you put it out there in some digital  
24 media way and the witness is saying A, B, C, D, E, F, G,  
25 that is -- particularly if a witness is testifying, you

1 know, for more than 90 seconds, then someone who could get  
2 that, take it, and run it through one of those generative  
3 AI software applications and change that testimony to  
4 where it says something different and then put it on  
5 social media posts, and that goes viral, that could cause  
6 all kinds of problems, because it -- not only could it  
7 expose the particular witness to the kind of responses  
8 that oftentimes happens in this somewhat cantankerous and  
9 rough-and-tumble digital world of social media where  
10 people start listening to something and then responding  
11 sometimes in very, very violent language and sometimes  
12 violent acts.

13           It could also reduce the public's confidence  
14 in the court system itself, because if the outcome of that  
15 trial, based on those witnesses, was different than what  
16 the altered version of their testimony suggested the  
17 outcome should have been, then you're going to have to  
18 have blowback against the court system and the judge  
19 themselves; and the counterbalance of that, of course, is  
20 that our courts are public -- public proceedings, and, you  
21 know, we want the public to be able to come in there and  
22 to listen to it, so it is a -- it is a real challenge  
23 there. You know, there are some ways that you could,  
24 perhaps, have -- there are some technical people who say  
25 that there's -- you can embed in certain electronic



1 produced media sort of a watermark that would show this is  
2 the authentic one.

3           But to me that's not the problem, because  
4 you could go out there and say, "Well, here's the  
5 authentic version of that. We broadcast that, and we want  
6 to put it out so the public could hear it, but if it's not  
7 this version right here," and then you've got that because  
8 it's got this little watermark at the beginning, then it's  
9 not legitimate. First of all, watermarks can be hacked,  
10 and, number two, it's not -- it's not that you're likely  
11 to have a big dispute in court about whether this is what  
12 the witness said or didn't say, because you're going to  
13 probably have recordings of it as well and maybe even a  
14 stenographer, so you've got lots of different ways to know  
15 what was actually said. It's going to get out there in an  
16 inaccurate way in some sort of context that's going to  
17 make it appear as though it's different, and that's going  
18 to have a very unpredictable impact on the public.

19           How do you deal with it? Well, I don't  
20 think that the technology people can tell you that there's  
21 any way to prevent that from happening. And then the  
22 question then becomes is if you put it out there, is it  
23 going to happen, and we could probably predict it that it  
24 will, and then how are you going to -- how are you going  
25 to set the record straight, and it's not a real effective

1 way of knowing how you would do it, and you've got to  
2 balance that against do we say we're not going to allow it  
3 in, and that's the problem, too, because it deals with  
4 sort of public awareness of what the courts are doing.

5           So I wish I had a really good answer for  
6 you, but -- but that is -- I believe very strongly that if  
7 it is put out there in a way that it is publicly available  
8 and can be captured in digital form, you're going to find  
9 things that are being altered.

10           MR. ORSINGER: Judge, thank you for the  
11 clarity of your thinking and the clarity of your  
12 explanation.

13           HONORABLE PAUL GRIMM: Thank you, sir.

14           MR. SMITH: All right. We have one more  
15 question before our break. Justice Christopher.

16           HONORABLE TRACY CHRISTOPHER: Yes, Tracy  
17 Christopher. I'm an appellate court judge in Houston. So  
18 I agree with you that the vast majority of electronic  
19 evidence that is being admitted right now where we might  
20 have authenticity issues is family court, but I'm a little  
21 afraid that your proposed rule of authentication would  
22 require expert witness testimony and an increased expense,  
23 so it seems to me that if -- if I want to get in a text  
24 message, I should be able to say, "This is my phone. This  
25 is the number of my, you know, terrible husband, and this

1 is the text message that he left me," and then he has to  
2 do something before I would be forced to have an expert to  
3 say that the system is reliable and reliably captured that  
4 text message, and not just "That wasn't me." So I think  
5 your authentication is going to be too difficult in many  
6 cases.

7                   HONORABLE PAUL GRIMM: Judge Christopher,  
8 let me just respond to that. It's a terrific question.  
9 You're absolutely right. I mean, our -- you know, the  
10 family court judges of this country are -- are  
11 unbelievable heroes, because they hear the most awful  
12 things all the time and oftentimes without the lawyers  
13 there. What I would say to you is that the authentication  
14 rule that "the system or process shown to produce reliable  
15 and valid results," the point that I would make is that's  
16 just a single way of authenticating. It's not the only  
17 way of authenticating.

18                   The other way of authenticating is exactly  
19 the one that you say, and so if the proponent says, you  
20 know, "I lived with this guy for, you know, X number of  
21 years, and he's my rotten ex-husband, and he's saying  
22 these terrible things, I know his voice," that is enough  
23 to authenticate, and I agree with you. Under those  
24 circumstances, the mere denial by the husband, enough, is  
25 not enough to require her to have to come in with an

1 expert.

2                   Where do we leave that? Well, at that  
3 particular time, you know, I don't know in Texas, but I  
4 know that in Maryland, my home state, and here in North  
5 Carolina, the family courts, at least on custody things  
6 they don't have juries, so the judge is going to be making  
7 the call; and I think that the way that we deal with  
8 things like that, when I have had the privilege of doing  
9 continuing education for Maryland's lawyers or judges, is  
10 we've come up with little -- little proposals that we work  
11 with them to come up with a list of questions that they  
12 would then ask the -- that the proponent of it, to help  
13 get further explanation of how it operated, so that they  
14 had some sort of a standard checklist of questions they  
15 could to get the record a little bit clearer to decide  
16 what they want to deal with; and then the burden would be  
17 on the person who -- to challenge that and show that it's  
18 not there and the lack of ability to do that.

19                   Then what the judges have done and what they  
20 typically do and where, frankly, the judges are phenomenal  
21 in their ability to do that, is most of them will say, if  
22 it's a close question, "Well, I've considered it, but I  
23 don't give it much weight for the following reasons," and  
24 they would make a decision based on other factors as well.

25                   So I agree with you. The way I would

1 propose to do that is to make it real clear that this is  
2 just one method of authenticating and that there are  
3 others as well and that, particularly in certain types of  
4 courts, it may be that you would want to say that we don't  
5 want to -- I know that in Maryland courts, certain courts,  
6 there's a relaxed set of Rules of Evidence where you don't  
7 have to strictly apply them. That might be a way of  
8 dealing with it as well.

9 MS. WOOTEN: Thank you very, very much,  
10 Judge Grimm. I hope everyone will join me briefly in  
11 giving a round of applause for --

12 (Applause)

13 MS. WOOTEN: Thank you. We are now going to  
14 take a short break. We'll come back at 11:15 sharp so the  
15 panel discussion can start then. Our meeting will go  
16 until 12:10, which should give everybody plenty of time to  
17 get over to the lunch venue. Thank you.

18 (Recess from 11:06 a.m. to 11:19 a.m.)

19 MS. WOOTEN: All right. So I have the  
20 pleasure of introducing our esteemed panelists for the  
21 final discussion today, entitled "Monitoring and Managing  
22 AI."

23 First, we have Judge Ferguson. He presides  
24 over the 394th Judicial District in Texas, and for those  
25 of you who don't know, that is the largest Judicial

1 District in Texas, covering roughly 20,000 square miles.  
2 If you don't know Judge Ferguson already, you might know  
3 of him as the judge, who, during the pandemic, told a  
4 lawyer in a Zoom hearing that "It's okay," in response to  
5 that lawyer telling him, "I'm not a cat"; but beyond this  
6 feline notoriety, Judge Ferguson is well-known for being  
7 an avid proponent of equal access to justice for all  
8 Texans and an early adopter of technological innovation.  
9 He's being named a 2025 ABA Legal Rebel, which is a  
10 designation bestowed upon persons whose innovations remake  
11 the legal profession and set new standards that will guide  
12 the profession in the future, so this is a rebel with a  
13 cause, I think is the best way to say it. There we go.  
14 He's a frequent speaker on AI issues, and I've certainly  
15 learned a lot from him. I think most of you will also  
16 learn a lot from him today.

17           Next, we have Dan Schuch, and he is here  
18 thanks to one of our former committee members, Kim  
19 Phillips, so gratitude to her. Dan is managing counsel of  
20 Shell's information and technology department. In that  
21 capacity, he leads a team of 24 lawyers who are  
22 responsible for cybersecurity, data privacy, technology  
23 transactions, and technology regulations, including with  
24 respect to AI. Before he joined Shell about 10 years ago,  
25 he handled litigation, both in private practice and with

1 KBR. He has deep practical insights into how corporate  
2 America is using and managing AI, and we're grateful to  
3 have him with us here.

4           Last, but certainly not least, we have  
5 Parker Hancock. He is a technology lawyer at Baker Botts.  
6 His practice covers intellectual property, data privacy,  
7 cybersecurity, and AI governance. He regularly advises  
8 companies of all sizes on how to protect their IP  
9 investments and how to ensure that AI is deployed in a  
10 responsible and compliant way. He's a member of Baker  
11 Botts' AI steering committee, helping to guide responsible  
12 AI adoption and deployment in law firms, as well as among  
13 lawyers.

14           So before we get into the questions, I want  
15 to just reiterate something that Judge Grimm touched upon  
16 in his presentation, and that is the type of AI we're  
17 talking about. AI, of course, has been used by lawyers  
18 for many years. I've used it myself with document review.  
19 TAR is a term that -- an acronym you've probably heard of.  
20 That's technology assisted review, and it's been used for  
21 many years. AI is something we've used with spellchecking  
22 and other aspects of our life for a long, long time, so  
23 what we're really talking about when we have this dilemma  
24 about AI and how do we handle it, how do we use it, as  
25 lawyers, judges, et cetera, is generative AI in large

1 language models.

2           So I want to start with a type of that  
3 generative AI and a sanctions order that came out just  
4 last week. You all may be familiar with it. This came  
5 out of the Eastern District of Texas, and it relates to an  
6 attorney's use of an AI tool called Claude. This is  
7 something that the AI (sic) used when preparing a brief,  
8 and he got sanctioned, because Claude resulted in case  
9 cites referring to nonexistent cases and nonexistent  
10 quotations. Problematic. So, Judge Ferguson, I'm going  
11 to start with you and ask whether you've encountered AI  
12 problems like this in your court, and if so, how have you  
13 addressed those issues?

14           HONORABLE ROY FERGUSON: Thank you, Kennon.  
15 I feel like at this point every judge has encountered it,  
16 whether you realize it or not. The most obvious ones are,  
17 in the smaller areas, we have a very small population of  
18 lawyers, so we get to know their writing styles and, let's  
19 just say, their skill levels, and sometimes in the last  
20 year or so, you'll get a brief, and it starts out in  
21 crayon. Can you not hear me?

22           It will start out with it in crayon at the  
23 top, and, you know, on a Big Chief tablet, to go back in  
24 history of Texas, and then in the middle there's a  
25 beautifully written argument with case cites, all with one



1 syllable, like *Smith vs. Jones* and *State V. Sams*. It's  
2 obvious that that's been generated by AI, and so we are  
3 seeing a lot of it.

4 I don't know if we have anyone here from the  
5 Houston court of appeals. I think it was Justice Countiss  
6 who said to me that they got a brief that said, literally,  
7 "The appellant should win because ChatGPT said the  
8 following" and cut and paste in ChatGPT. So the answer is  
9 it is everywhere, and it is all the time, and the question  
10 is whether we can figure out that it's there or anyone  
11 brings it to our attention.

12 MS. WOOTEN: Thank you very much, and,  
13 Parker, I wanted to turn it over to you now, because in  
14 preparing for this presentation, I thought some of your  
15 comments about the sanctions were fascinating, so the  
16 question to you is do you think that the problems that  
17 gave rise to this order were attributable to a lawyer or  
18 to the AI, and, if the former, what are your suggestions  
19 for more responsible use of AI?

20 MR. HANCOCK: Sure, absolutely, and I think  
21 that the first part of that question is pretty obvious,  
22 right. This one is entirely on the lawyer, and it's  
23 entirely on the lawyer for two specific reasons. The  
24 first one is it's a clear demonstration that he failed to  
25 take ownership of the final work product, right. Like,

1 all of us have our own unique processes. Those processes  
2 will include AI in the near future, if they don't already,  
3 but at the end of the day, you have to take ownership of  
4 the work you're actually doing; but maybe one of the more  
5 fundamental problems is, you know, lawyers often do have a  
6 hard time viewing technologies; and when you sit in front  
7 of a blinking cursor at one of these chatbots, you think  
8 you're getting a Google-like experience; and as it turns  
9 out, that's not the case at all; and I think a lot of  
10 lawyers don't understand what kind of tool a generative AI  
11 system actually is.

12           So, for example, I have worked on portions  
13 of briefs before using the assistance of AI, and it's  
14 something that I have taken very close ownership of. I  
15 always have my legal research tool right next to me, but I  
16 think something that Judge Ferguson said was really  
17 important here. The AI writes really well, like taking  
18 apart the facts, the law, the arguments. When was the  
19 last time you saw a chatbot make a spelling error or not  
20 use correct grammar, right? There are studies out there  
21 that show that people prefer AI written poetry to human  
22 written poetry, and so, really, the key to using AI well  
23 is to understand how to leverage its strengths with your  
24 own strengths and finding that balance.

25           The last thing I'll say and then we can move

1 on to the next question, there was a fascinating study  
2 that the Harvard Business School did called *The Jagged*  
3 *Frontier*, and it was a study they did, looking at business  
4 consultants where they gave them access to a TimeGPT-4,  
5 and what they essentially found was that when people using  
6 GPT-4 could find places where the AI could outperform them  
7 and they leveraged it to that end, they were much more  
8 productive or able to accomplish work faster, but there  
9 are some things that the AI was less good at, and when  
10 people could not identify those weaknesses, the use of AI  
11 actually harmed their job performance. And so the  
12 challenge of AI and adopting AI is really trying to find  
13 ways to navigate that jagged frontier of finding where  
14 it's an amplifier and finding places where it's going to  
15 get you into trouble.

16 HONORABLE ROY FERGUSON: Can I ask him a  
17 question?

18 MS. WOOTEN: Absolutely.

19 HONORABLE ROY FERGUSON: So automation bias  
20 is something that we are struggling with all the time, and  
21 our rules adopt automation bias, because we have a rule  
22 that says if it's computer-generated then it's okay,  
23 right, it's already coming in. Now we've got that same  
24 thing, but we have a population who believes that AI is  
25 intelligence, it's smarter than me, it's a smart computer.

1 So are you seeing that automation bias factoring into what  
2 you're talking about --

3 MR. HANCOCK: Yeah.

4 HONORABLE ROY FERGUSON: -- with lawyers  
5 and --

6 MR. HANCOCK: Yeah.

7 HONORABLE ROY FERGUSON: -- this blind trust  
8 of the product?

9 MR. HANCOCK: Yeah. Yes, absolutely, and, I  
10 mean, one of the things that is challenging, to go back to  
11 this Jagged Frontier, up until two months ago, the state  
12 of the art was that AI could come almost to performing as  
13 well on Ph.D. level problems in biology, chemistry, and  
14 physics as people with Ph.D.'s and also could not count  
15 the number of R's in the word strawberry, right, and so  
16 what that means is it's very difficult to find where the  
17 places are that it may actually be much better than you  
18 and the places where it really isn't, and that automation  
19 bias tends to flatten that out. It doesn't help that  
20 we're used to interacting with humans that have a more  
21 sort of even knowledge distribution, right. Once we feel  
22 like we get to know someone's work product, we feel like  
23 we can make predictions about how it will behave in the  
24 future, and sometimes those expectations just don't pan  
25 out.

1 MS. WOOTEN: Dan, relating to Parker's  
2 explanation of responsible AI use, you and I have talked  
3 about attorney ethics issues that come into play with  
4 respect to AI. From your perspective, what are some of  
5 the key ethics issues that come into play, and relatedly,  
6 how has Shell managed some of those ethics considerations?

7 MR. SCHUCH: First, thank you for having me  
8 this morning. What an honor to be here, for the whole  
9 committee, so thank you.

10 Ethics, this is an interesting paradigm,  
11 too, because it's one of the unifiers that we have with  
12 the world, is everyone who is experiencing some type of  
13 generative AI tool, and that's what -- let's go back to  
14 it's not thinking. It's a program. It's a tool, but  
15 their experience is on thousands of instances per minute.  
16 Each one of those instances, whether it's my 14-year-old  
17 daughter or a fifth year associate, experiences things.  
18 They have to contend with ethical dilemmas like is there  
19 bias inherent in this prompt that I'm putting into the  
20 system or the information I am getting back? Is it  
21 accurate?

22 Again, Parker said it so well. Accuracy is  
23 one of these things that we can't count on anymore. It's  
24 not a Google search and just coming back with an article  
25 from the *Harvard Business Review*. It's creating on its

1 own, so it's a poet, it's a writer, it is -- and that's  
2 the risk. So is it accurate? You need to have tools to  
3 be able to ascertain accuracy. And then the vein of  
4 access to justice, who doesn't have access to it? Are  
5 you -- do you have an upper hand than your counterparty?  
6 Then, going back to my 14-year-old preparing for debate in  
7 class, do they have an upper hand against someone who  
8 doesn't have that access?

9           So that's the unifier, but lawyers, holy  
10 cow, we have some unique dilemmas here. Let's talk one --  
11 Parker touched on this, and that's competence. There are  
12 two that go hand-in-hand, and I'd just like to say, we  
13 have a duty of competence and a duty to supervise  
14 nonlawyer systems.

15           Remember, back in 2012, the ABA changed,  
16 it's not assistant. It's assistance now, and that  
17 includes in tools. We have a duty to do those two, so you  
18 need competence to understand what you're using, and then,  
19 second, a duty to manage what you're doing with it. So I  
20 think those two are risks that we face, and then we'll  
21 talk about how you get -- contend with those unique  
22 things. So, like I said, three layers of ethical risks.  
23 So one is general population. One is us as -- you, as  
24 lawyers. The other one that are a dilemma, a lot of you  
25 who are outside counsel and in-house counsel, another

1 unique one is reasonable fees. If you haven't figured  
2 that one out yet, that is a real reality, because some  
3 lawyers, let's say they can generate this wonderful brief  
4 that has been submitted to Judge Ferguson. Typically it  
5 would take 10 hours. They just did it in two. There's  
6 some articles that say does that lawyer get the benefit of  
7 that time? They shouldn't, right? So reasonable fees is  
8 another dilemma that we're going to have to contend with.

9           Then I'll throw in the final thing, sorry,  
10 Kennon, is privilege and confidentiality. That's my  
11 biggest fear. And work product, throw that one in there,  
12 too. If we put in -- let's just use the one example.  
13 Let's say we retained Parker to do a new engagement. He  
14 properly uses tools. He uses Claude, like attorney Monk,  
15 as well as Westlaw, in unison. That's great. But what  
16 about the prompt that he puts in? A few issues. Shell  
17 presented us with this dilemma. Is that a declaration  
18 against interest? It just went into a public record,  
19 arguably public record. So you've got to really think  
20 about what you're using as part of the duty of confidence,  
21 who has seen that information, and then if it's like an  
22 open AI system, who else could have access to that  
23 training data? Did we just lose confidentiality? And  
24 then, from my perspective, is privilege. It's really  
25 important for all of our cases.

1                   So these are the dilemmas that we haven't  
2 even began to scratch the surface. Some of the easy ones  
3 is competence, and, Kennon, I'll close your final  
4 question, what do we do to contend with it? Three things  
5 is policy, rules, and training. Rules, and that's just  
6 within Shell. I'll just say, so we have a policy, and  
7 what is appropriate use? We've had ethical use of AI  
8 programs since 2019. It's been around for a while, but  
9 then within legal we have -- we do turn off -- you know,  
10 we have my colleague from Exxon, too, here in the room.  
11 We do turn off certain tools within Shell systems. Some  
12 of them keep access to, like, Copilot. I have it on my  
13 screen right now, but then we can monitor that. It's been  
14 limited, but I've been trained on it. That's the third  
15 thing. So if you do those, I think it's appropriate, but  
16 then that helps to satisfy our obligation as lawyers.

17                   HONORABLE ROY FERGUSON: There's a dual  
18 problem on the ethics question, because the judges in the  
19 room, I'll get an amen from this, more than 50 percent of  
20 your civil cases have a self-represented. They are the  
21 least sophisticated people in the law and in this  
22 technology. They are the most likely to use it, and  
23 they're almost certain to use the free versions, and what  
24 you may not know is the free version is so much worse than  
25 the paid version. If you've used 3.5, GPT 3.5, and



1 compared it to 4.0, oh, my gosh, it's completely  
2 different. One of them doesn't know how to spell "cat,"  
3 right, but this is the free version, and they don't know  
4 that's true.

5           So the product that we're getting from the  
6 people who aren't bound by the disciplinary rules that the  
7 lawyers are is a lesser product, with a less reliable  
8 result, and you're more likely to get it. So when we're  
9 talking about these rules and when y'all make these  
10 decisions, keep in mind that's probably the lion's share  
11 of the people using AI. It's the people least able to  
12 understand it, to verify it, and they're not bound by the  
13 same ethical rules that we're talking about.

14           MS. WOOTEN: That's a great transition into  
15 the next question, Judge Ferguson, because you've talked  
16 about the wheel of acceptance in relation to AI and  
17 helping people sort of bridge that gap, if you will,  
18 between blind faith and cautionary use. Can you get into  
19 that a little bit more, including by giving us some  
20 examples of AI's capabilities, risks, and limits, please?

21           HONORABLE ROY FERGUSON: Sure. And do we  
22 have that slide? There it is.

23           All right. So you may be familiar with  
24 the -- the wheel or the path of adoption, right. It's new  
25 technology. This is typically the way you describe how

1 new technologies are incorporated into the marketplace,  
2 the -- any profession. It starts with blind acceptance  
3 and trust, and we've all seen that for the last year and a  
4 half, right. All of these lawyers who know better, who  
5 just trust that everything is fine and the system does  
6 what the commercials say they do, and they use it blindly,  
7 and they're getting sanctioned, and those of you who think  
8 that's a really narrow window, last week a lawyer got  
9 sanctioned because of step one, except he doubled it up.  
10 He took an AI-generated product and put it into another AI  
11 product and said "Verify that product one was correct."  
12 It did not, and so he's literally paying the price for  
13 that.

14                   So with AI, this is the problem, and this is  
15 what we have been preaching to people to somehow bridge  
16 across the blind acceptance, get into the skepticism now,  
17 without having to be sanctioned first. Learn from other  
18 people's mistakes. Once you start questioning, then you  
19 start evaluating, then you start checking every case cite  
20 and every argument.

21                   I assume everyone in here has seen the  
22 Stanford supplement of their study on the accuracy of AI,  
23 Lexis AI and the Westlaw AI. That's the best we have.  
24 It's what we trust every day, and yet, more than half of  
25 the Westlaw-generated argument, the AI-generated argument,

1 had a hallucination in it. It was wrong. More than half  
2 were wrong. With Lexis, it was around 40 percent that was  
3 wrong. So the thing that we rely on every day to tell us  
4 what the law is, if you rely on that same product to  
5 generate an explanation of the law, more often than not  
6 it's wrong, right? So when we get to critical evaluation,  
7 we need to explain what that means. It doesn't mean run  
8 another AI. It means you have to verify it.

9           Then we get to pragmatic adoption, and then  
10 it becomes like the fax machine. Some of you may remember  
11 when e-mail was introduced. Did you have lawyers in your  
12 firm that said, "I'm not using it because I don't trust  
13 it"? We did, right. It follows the same path, and so,  
14 you know, I have a local rule about AI that is an  
15 acknowledgement. It doesn't require them to tell me when  
16 they use it. It says to them, "You must acknowledge that  
17 you have to verify." The AI won't get held in contempt,  
18 but you will if you submit an AI product that's false.

19           The explanation for why I did that is to  
20 skip step one, because the last thing I want is to  
21 sanction a lawyer, to have their license in jeopardy, to  
22 get sued by their client, or to do something unjust, to  
23 have an unjust outcome, because I'm relying on something  
24 with someone mired in step one, and so I give them a  
25 little scare. You're the one who's in trouble if you

1 don't verify everything. I have not had that problem. I  
2 have had a lot of AI, but I have not yet had someone who  
3 violated that rule that I can find. So this is the wheel  
4 we're talking about. You want me to go on?

5 MS. WOOTEN: Yeah.

6 HONORABLE ROY FERGUSON: All right. So when  
7 this group is talking about artificial intelligence and  
8 how to handle it, we have evidence, discipline, and we  
9 have self-represented litigants. These are the three  
10 things I hope that y'all will be working through as you go  
11 through your process. The reason we worry is because it's  
12 free, it's everywhere, and people think having the word  
13 "intelligence" means it's intelligence. It is not  
14 intelligence. It doesn't think, and even though the word  
15 "learning" is in LLN, does it learn?

16 MR. HANCOCK: We can have that conversation  
17 later.

18 HONORABLE ROY FERGUSON: It doesn't learn --  
19 it doesn't discern what it learns. Do y'all remember when  
20 they unleashed AI on social media, and within two minutes  
21 it was the most racist account on social media, and they  
22 had to turn it off? It learns by adopting what it sees.  
23 That doesn't make it learning. That makes it absorbing.

24 And this is my phrase: AI increases  
25 confidence, not competence. It looks good. It makes you

1 believe you have the right information, but you don't. It  
2 doesn't make you any better at it. It doesn't increase  
3 your knowledge base. You absorb what the generative AI  
4 gives you and assume that it's true, and if it's not, your  
5 competence has gone down, not up.

6           And self-representeds, they're not  
7 constrained by our disciplinary rules. I don't care what  
8 anybody says. Oh, yeah, you're held -- no, you're not.  
9 They don't know, they don't care, they don't read it.  
10 They come in blind. And neither is AI. You may think AI  
11 images look like the old robot and the funny faces. These  
12 are AI images. These fooled people all over the world.  
13 The one on the left is an account that had millions of  
14 followers, including politicians, actors, and actresses.  
15 They all believed she was real, and she doesn't exist.

16           Now, the definition of AI, and you had a  
17 proposed rule that you saw earlier that talked about  
18 digital evidence and AI evidence. Those two phrases don't  
19 mean anything anymore. Everything is digital in my court.  
20 You scan everything in and upload it. The court of  
21 appeals doesn't get a physical thing. They're going to  
22 get these uploads, right. Everything becomes digital, but  
23 artificial intelligence and deepfakes, this is a real  
24 video that you're about to see. When it's done, I want  
25 you to tell me whether this is AI-generated or not. Here

1 we go.

2 (Video playing)

3 HONORABLE ROY FERGUSON: So this is using an  
4 app on a cell phone that is available to you right now,  
5 typing in "Lake with large castle in the middle," and  
6 typing in over here, "snowy mountains," and over here  
7 we've got fall leaves, and up here, we have tree with fall  
8 foliage. Now, watch closely. The video continues. The  
9 lake moves. Look at the birds flying across.

10 Now, is that an AI-generated video? It was  
11 a real video, right? It's AI-manipulated, so when you  
12 have any rules and you try to include terms like "AI  
13 evidence," that's -- it means nothing to those of us who  
14 know what that means. Cell phones, the Google Pixel, has  
15 a built-in thing, and you've seen the commercials because  
16 they were on during the Super Bowl. You can turn a frown  
17 into a smile. We have a family photo, and you have one  
18 kid crying, and you click the button, and the kid is all  
19 happy, right. You did it by changing 50 pixels. That's  
20 all. Is that an AI-generated image? It's manipulated.  
21 That's the fear. That's the fear that we deal with every  
22 day. It's when we get a drug test, and all they changed  
23 is the "POS" to "NEG" in an eight-page document. That's  
24 all it takes.

25 This is a currently existing app that I have

1 played with. I can make myself anyone. The one on the  
2 left is the real person. The one on the right is what's  
3 showing up in Zoom. It also modulates the voice and makes  
4 the voice female instead of male, so you may be thinking,  
5 I can see them on Zoom, clearly they're real. AI says no.

6           So let's look a little bit about deepfakes.  
7 You heard earlier, 90 seconds. I believe it's 30 seconds,  
8 because they did this to me, the OCA, in a speech. They  
9 took my voice from an AI presentation. They plugged it  
10 in, and they deepfaked me to introduce a topic where I  
11 said I thought AI should be given the profession and take  
12 over the world, but the more you have, the better, and  
13 those of us who speak all the time, and especially, think  
14 about the Supreme Court justices, every word they say is  
15 being recorded by someone with a cell phone. It gets  
16 better and better and better.

17           Now, who remembers the movie Pulp Fiction?  
18 All right. Do y'all -- you may not remember that Jerry  
19 Seinfeld was in the cast.

20           (Video playing)

21           HONORABLE ROY FERGUSON: Here we go.

22           (Video playing)

23           HONORABLE ROY FERGUSON: That's the final  
24 episode of Seinfeld. You may have missed that.

25           So this is ancient technology, because AI,

1 what we're calling generative AI, is two years and one  
2 week old. John Browning and I almost had a birthday  
3 celebration for it last year when we did a speech. This  
4 is a year old, so this is basically the juvenile age of  
5 AI. It's pretty good, right? The newer ones now, you  
6 don't get the tiny wobble you got when he turned to the  
7 side. It is absolutely perfect. This is the risk. This  
8 is what we're dealing with.

9           So evidentiary predicates already cover  
10 manipulation, and this is something that I haven't heard  
11 mentioned, and it's not in our presentation, but let's  
12 mention it now. Rule of Evidence 1002 and 1003, they  
13 address originals and duplicates. All right. So if you  
14 don't have an original, which I assume that y'all would  
15 request in discovery, we want the original of your digital  
16 items. If you don't get one, say, for example, you have a  
17 photo that they tell you is from 2018 and the metadata  
18 shows it's 2022, you have a duplicate. Then you can go  
19 under Rule 1003, and there's already a standard for  
20 exclusion of a duplicate.

21           If it's an original, you've got the  
22 metadata, and I'm willing to bet you can tear that thing  
23 apart and know everything anyone did to it. If they've  
24 stripped that data out, that could be spoliation. It  
25 certainly is an excludable basis under 1003. So just as a



1 throwaway here, when y'all are evaluating creating new  
2 rules for AI, take a look at those rules, because we've  
3 already got a way that no one uses to challenge digital  
4 duplicates that are not the original file. So what we are  
5 telling judges in our speeches is you've got to now put  
6 the burden back on the proponent. In the old days, if  
7 someone said, "That's not real," we would say, you know,  
8 "Prove it. How do I know that? Do you have any proof  
9 that it wasn't the white truck, that you weren't there?"  
10 Now, with AI, it's so easy to manipulate, the burden needs  
11 to stay on the proponent. And we were talking at our  
12 table about the proposal of 901(c).

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE ROY FERGUSON: Shifting the burden  
15 to the objecting party. That's not what we're here to  
16 talk about, but keep in mind, the burden is on the person  
17 who says this is legitimate evidence. The other side  
18 shouldn't have to prove it's not. That changes  
19 everything.

20 This is the question that we ask when it  
21 comes to the Google Pixel edit. Did the moment in the  
22 picture ever actually exist? Yes, this is what the scene  
23 looked like. Yes, this was the moment captured, but you  
24 changed a frown into a smile, or you put a black eye on  
25 someone, right. The question is not does it look like the

1 scene, which we heard earlier. It's did that moment ever  
2 actually exist in the universe from the perspective of the  
3 person holding the camera? If the answer is no, the  
4 evidence should not satisfy the existing predicate in the  
5 rules, so my belief is this is primarily a training issue  
6 with the existing rules that we have.

7           This is a great example of another issue  
8 that was brought up, and I'm going to throw it to y'all in  
9 a second on this, because when we're talking about how to  
10 prove the validity of evidence, of an opinion, this is an  
11 area where we are being told that every speech -- this is  
12 something ChatGPT is great at, summaries. You can give it  
13 voluminous information, and it will summarize it and give  
14 you a chart that you can then offer.

15           Okay. So there's our Rule 1006. This is  
16 the predicate that is published for how to get those in.  
17 Did you review the records, and is the summary an accurate  
18 representation of the records? Now, our corporate people  
19 know there's a way to have someone come in and say, "I did  
20 test runs, and we did these word searches, and we  
21 confirmed the accuracy." Can you do that with an AI  
22 summary where it looks at a hundred thousand e-mails and  
23 generates a report? Can you --

24           MR. HANCOCK: Not effective -- I mean, there  
25 are -- there are ways you can kind of get at it a little

1 bit, but the answer generally is no.

2 HONORABLE ROY FERGUSON: Can you get the  
3 training model and offer that in court as proof of the  
4 reliability of the opinion of the AI?

5 MR. HANCOCK: Absolutely not.

6 HONORABLE ROY FERGUSON: That's not how it  
7 has to be done, folks. You can't get that information.  
8 It changes minute to minute. It is not a basis for saying  
9 anything AI did is accurate. The only way to prove the  
10 accuracy is to evaluate the accuracy of the result and  
11 compare it to the data, right. So when you have  
12 summaries, a human being is going to have to do what we've  
13 always done with our searches of millions of documents in  
14 civil cases and review with our -- pull a slice and check,  
15 do a word search and check. It's nothing new. You've got  
16 to do it the same way under the existing rules. There is  
17 no automation bias or ipse dixit that should say the  
18 computer-generated answer comes in because it was  
19 generated by a computer and computers are always right.  
20 Okay. That's the old ipse dixit wheel, so let's make sure  
21 we don't go down that road.

22 If it didn't require interpretation, it  
23 didn't use AI. It used a search, a database search, so  
24 that's not the issue. The issue is when AI uses  
25 discretion. List out every time that there was a threat

1 between the husband and the wife in the last 10 years of  
2 e-mails, and it says there were three. List out  
3 obscenities, list out name calling, right. That is when  
4 discretion -- but you have to verify that it was  
5 categorized correctly, and if not, you cannot satisfy the  
6 last element of 1006, does it prove the contents. They  
7 can't prove it, the summary is out, if they don't have a  
8 human being who verified it.

9           So AI doesn't think, right. It's not  
10 intelligence. This was said at the speaker -- by the  
11 speaker before Justice Browning and I spoke in June. He  
12 said, "We want you to think of AI and ChatGPT as a 3L or a  
13 first year associate," and we both sat straight upright.  
14 Please don't do that, because it's not a human being. It  
15 is not a smart search engine, as he said. It just  
16 generates words. That's all it does. Do you want to talk  
17 about what that means, what a word generator is in this  
18 LLM?

19           MR. HANCOCK: Yeah, sure, so at a really  
20 foundational level, all of these large language models are  
21 predicted models that are trained on one simple task, what  
22 is the next word. So looking at a -- something like a  
23 crawl of the entire internet, given some sequence of  
24 words, what should the next word be, and that's the task  
25 that it -- that it's trained for. All of the other

1 behavior that we see, where it can solve problems or do  
2 summaries, are the things that emerge out of that next  
3 token prediction behavior.

4           We don't have time here to go into all of  
5 the research around that, but there's -- there is this  
6 property to LLM's that's emergent abilities where when the  
7 models get really big, simply training on this next word  
8 prediction, that's where you get summarization, that's  
9 where you get question answering. That's where you get  
10 all of these sorts of things, so, yeah, that's kind of the  
11 short version of it.

12           HONORABLE ROY FERGUSON: That's why it  
13 struggles with context, because it doesn't consider the  
14 context. It's what's the next word? There is no context  
15 being evaluated by the AI generator. It suffers from  
16 bias. We don't have time for that. There's six different  
17 biases that are inherent in generative AI. They're there  
18 every day, all the time, and there's no way to evaluate  
19 the degree at which they apply to the product that you  
20 get. It's not constrained by ethics. It's only by the  
21 programming and the data it's given, and here's what he  
22 was mentioning about the prompt. If you give it a prompt  
23 and the only way to fill that prompt is to make something  
24 up that doesn't exist, that's what it will do.

25           It will fabricate data, cases, anything, to

1 answer the prompt in the way you give it to it. "Give me  
2 an argument that says I'm allowed to punch the judge in  
3 the face if I lose," and it will, by God, give you an  
4 argument with Texas case cites that says you're allowed to  
5 do that, because that's what it takes to fulfill the  
6 prompt, and sometimes it's just wrong.

7                   How many R's are in raspberry? Two. Count  
8 again. Oops, sorry, three. How do you get that wrong?  
9 How intelligent is it if it can't count the number of R's  
10 in a word?

11                   How about this one? Show me the image of a  
12 three legged stool. On the left you have Copilot. This  
13 was about three weeks ago. On the right you have ChatGPT.  
14 Are those three legged stools? They are not.

15                   MR. LEVY: They are.

16                   HONORABLE ROY FERGUSON: Well, there's also  
17 a fourth. Very nice.

18                   Okay. How about this one, smart guy? Is  
19 there a missing finger on this one? You could say, yes,  
20 one of them is another thumb, right. That's a good  
21 answer.

22                   All right. Let's see what's this one.  
23 Okay. So I had to take all of this out in the interest of  
24 time. I had an argument with ChatGPT and Copilot where I  
25 asked them how many times was UT shut out in football in

1 20 years. Both of them got them wrong. Not only did they  
2 leave out a shutout, but they each fabricated a shutout  
3 that didn't happen, and so I would say, "What was the  
4 score of Iowa State and Texas in 2014?" And it would say,  
5 "Oh, 30 to 7, not 30 to 0. That's not a shutout. My  
6 apologies, an oversight." After this went back and forth  
7 I asked both of them this question: "Given the number of  
8 incorrect answers you provided to such a simple question,  
9 would you recommend that anyone use your service?"

10 ChatGPT said -- (Indicating)

11 Copilot's was worse. Can you believe it?  
12 And how about the prayer hands, like "Thank you so much."  
13 And it grayed out the box. I was not able to use it after  
14 that. It was so mad that I asked it, "Can anyone trust  
15 you," that it cut me off from the conversation.

16 Oh, yeah, this is the one that drives me  
17 crazy. I want to warn all of the judges in here and  
18 everyone who says you can upload an argument or briefs or  
19 evidence and ask it to summarize and it will. I did that  
20 with an eight-page document that had 17 initiatives, and I  
21 said, "List the initiatives," and it came back with a list  
22 of 10, and I said, "Is that right? Did there just happen  
23 to be 10?" And look what it said: "No, that's not really  
24 very likely. Let me double-check. Oh, turns out there  
25 were 17." If I hadn't known, I would have submitted the

1 report to the Access to Justice Commission omitting almost  
2 half of the initiatives that we were proposing, just  
3 because I asked it a question that everyone tells me it's  
4 good at.

5                   Here's the ethical rules. These rules  
6 already apply, right now. These are the rules at issue  
7 that y'all are going to be evaluating with your  
8 conversations. You cannot treat AI like a person. You  
9 can't delegate. You can't trust it, and you cannot bill  
10 its time. It is not a person. So...

11                   MS. WOOTEN: Thank you very much, Judge  
12 Ferguson. Parker, I'm going to turn it back over to you.  
13 Beyond what you've shared already, I want to hear what  
14 your suggestions are for how lawyers and firms should  
15 think about and use AI, because I know you're delving into  
16 this on a daily basis.

17                   MR. HANCOCK: Yeah, sure. Absolutely, and I  
18 don't disagree with anything that Judge Ferguson  
19 mentioned, but I do think there are some important  
20 caveats, and I think the last one is sort of it's -- it's  
21 coming whether you like it or not, and coming with a  
22 velocity that I think a lot of people don't necessarily  
23 expect.

24                   If you've ever heard of a concept called  
25 Moore's Law, I'm an electrical engineer by training, so



1 that was my world. It's this idea that since the  
2 invention of the integrated circuit in the Sixties,  
3 computers have gotten twice as powerful at half the price  
4 every two years, and that's been running since the  
5 Sixties, and that's how you get the incredible devices  
6 that are sitting in front of all of you today that NASA  
7 astronauts would have loved to have on the Apollo flights,  
8 right, and what we're seeing is that AI is following a  
9 similar trajectory, but rather than doubling every two  
10 years, it's more like somewhere between eight to eleven  
11 months, right, and so, you know, we are seeing advanced  
12 capabilities come online very quickly, and I mentioned  
13 earlier the idea of the Jagged Frontier, and that remains  
14 a very important concept to keep in mind, and a lot of  
15 what I think Judge Ferguson was looking at are places  
16 where he was finding that Jagged Frontier and asking it to  
17 do things that were well beyond it, right. But it's hard  
18 to know where it is, and that frontier only moves in one  
19 direction, which is more capability, even if it's harder  
20 to find.

21           So I think we, as lawyers, kind of have to  
22 start the process now of figuring out where it can be  
23 useful, where it can deliver better results, and where  
24 we're ultimately going to get in trouble with it and  
25 should not be using it. We are really sort of, I think,

1 in an inflection moment in how we interact with technology  
2 where we went from the Google paradigm or the sort of  
3 computers give you factual information paradigm to  
4 something a little softer, something a little bit more  
5 difficult to get our hands around, and it's just because  
6 it's only two years old that we've had easy access to this  
7 kind of technology.

8           So, you know, training is a big part of it,  
9 but one of the other difficulties with coming up with  
10 rules for this group, is how fast the technology is moving  
11 forward. I mentioned that two months ago the state of the  
12 art was that you could solve all of these pay sheet  
13 problems roughly at the level of a human, but you couldn't  
14 count the number of R's in the word strawberry.

15           Well, as of yesterday, the state of the art  
16 is that it vastly exceeds the performance of Ph.D.'s in  
17 physics, biology, and chemistry, and not only can it count  
18 the number of E's, it can give you a three paragraph essay  
19 without using the letter E, right, and that's just what  
20 happened in the last month. Example after example where  
21 people think that there are things that AI cannot do, it  
22 ends up being able to do it, and oftentimes on very short  
23 time lines.

24           One of the quotes that I always sort of  
25 think about. One analogy I love going to is the advent of

1 AI in chess, which is a very complicated game. There is a  
2 gentlemen named Gary Kasparov, who was the world champion  
3 in chess, and shortly after a few other grand masters had  
4 been beaten, someone asked him, "Do you ever think that  
5 you will fall to a machine? Do you ever think that you  
6 will find a machine that you cannot beat?" And he said,  
7 "Preposterous, no machine could ever do something so  
8 complicated. Can a machine write poetry? Can a machine  
9 answer questions? Can a machine even conduct this  
10 interview? Of course not." And three years later he was  
11 defeated by IBM's new computer, right.

12                   So I just want us to -- really, the parting  
13 that I'll have for all of you is to stay curious,  
14 challenge your assumptions, and be critical, right,  
15 because I think we're moving into something that we have  
16 not experienced in technology before, and having that  
17 curiosity, having both an open and a critical mind, is  
18 what we're going to need in order to figure out what the  
19 practice of law is going to look like, how we handle  
20 deepfake evidence, and how we move the practice of law  
21 forward.

22                   MS. WOOTEN: Excellent words of wisdom.  
23 Thank you, Parker.

24                   Dan, when we were talking about how  
25 corporate America is approaching AI, you talked about

1 something you referred to as global management and the  
2 need for it. Can you explain what that concept is and how  
3 it comes to play with AI, please?

4 MR. SCHUCH: Absolutely. So this is going  
5 to take it a step beyond generative AI. So we've been  
6 talking about generative AI pretty much extensively today,  
7 exclusively. Let's take one step further. AI is  
8 everywhere. I think that was said early, and it's been  
9 around since the 1950's, 1960's, it's been a concern,  
10 permeate our industries, our companies. So I would say  
11 you have to be mindful of the world in this current  
12 environment, particularly those of you who are in  
13 corporate America. EU AI Act is the leading -- just the  
14 cutting edge of regulation, so when we talk about global  
15 governance, it is being mandated by the EU right now. And  
16 it's interesting, actually.

17 There's a little bit of a political context  
18 to this. 2019 is a very important year. That is the year  
19 that EU Commission introduced their -- they call it the  
20 digital decade, and it was their digital strategy for the  
21 EU going into 2030, called 2029. Literally, within two  
22 weeks, the Trump -- the first Trump administration issued  
23 their first executive order on artificial intelligence,  
24 and probably no surprise, EU said, "We want to be the  
25 worldwide leaders of regulation." Trump administration

1 said, "We want to be the worldwide leaders of innovation,  
2 and we have a polar opposite approach," and that is still  
3 permeated through our industries and our countries today.

4           So that's why we have -- I'll say most  
5 companies have yet to establish a baseline. That's what  
6 my team does. We look at these global laws. We establish  
7 the baseline, do gap analysis, and how can we function  
8 with all of these different laws. So when most -- a lot  
9 of the companies right now are using EU AI Act, just like  
10 GDPR for data privacy, as our baseline, and then you  
11 evaluate the laws against those. It's hard, because  
12 they're coming up so fast. We have a patchwork in the  
13 States. We have China is doing the same thing. So that  
14 is 24 members of my team, very sophisticated lawyers, just  
15 going across all the world to see where the AI acts are.

16           So that's on the legal side, but there's  
17 really a practical side, because this goes for the law  
18 firms, the courts as well. We have a river and a lake  
19 scenario. We've got to know what's in the lake, what fish  
20 are in the lake today, what AI systems do you currently  
21 use that you may not know about? Not gen AI. We're  
22 talking about the spellcheck tool and all of these. Most  
23 companies, as we're starting to unpack this, we have well  
24 over thousands, and then you have to categorize them.  
25 That's where the lawyers get involved. You have to

1 categorize them from high risk to low risk, and there are  
2 different requirements that go to every single one of  
3 these. It's a huge task, very cumbersome, but that's just  
4 what you have today.

5           Then you have to think about the river  
6 coming into the lake. There's so much technology, you  
7 have got to put up the dam now to start evaluating  
8 procurement processes, how you're going to assess the  
9 different -- it's not just phones. It is critical  
10 infrastructure, how they manage the newest pipeline  
11 system, or OT, not IT. OT is real concerns. For those  
12 who understand the distinction between OT and IT, OT runs  
13 things like refineries. Lots of AI in there as well, so  
14 you've got to think what is in the lake, what is coming in  
15 the river. That's what my team always does, and we have  
16 to evaluate those and then categorize every level of risk  
17 so we can put the right controls on it. It all comes down  
18 to governance and control, Kennon.

19           MR. HANCOCK: I just want -- one sort of  
20 comment to add there that I think is worth mentioning.  
21 The advent of AI in the public imagination is only two  
22 years old. The AI revolution in business and industry is  
23 20, 30 years old at this point.

24           MS. WOOTEN: Good addition. You mentioned  
25 teams, Dan, and I just want to ask very quickly, what you

1 envision in terms of how the composition of the typical  
2 legal team will change in light of AI.

3                   MR. SCHUCH: Boy, that's a loaded question.  
4 Team is going to look very different. Two things,  
5 actually. It's not just the team, composition of the  
6 team. I think the work that we're delivering is going to  
7 be very different. We will start with the work first.  
8 Lawyers are frequently being weird dealing with in the  
9 realm of mitigation, right. We're before a court. We are  
10 trying to settle a dispute. It is shifting. It is going  
11 to much more preventative activity. That's what my team  
12 does. We're -- we -- my team, I'm always saying where are  
13 we on the horizons line? What's on the horizon three  
14 years, five years, 10 years from now, because we need to  
15 start to prepare for that now?

16                   And globalists go through that. You have  
17 fewer disputes also, so that's one shift. It's a mindset  
18 shift. How are we going to do that? I think the law --  
19 legal teams of the future are actually kind of grouping in  
20 the rule of thirds. We have legal advice, what we all  
21 know, with the lawyers, advice and counsel providers.  
22 Critical. Lawyers are always going to be critical to,  
23 obviously, the legal department and law firms. The other  
24 two is legal services. It's imagining corporate  
25 secretarial work, that type of thing, more of the

1 provision of a legal service that a company needs, but not  
2 necessarily a lawyer. That's one, and then operation on a  
3 -- legal operations underpins all of those.

4           So you have pretty much a third. The law  
5 department's future, you will have probably a third  
6 lawyers, a third of these services providers, and then a  
7 third of operations, and probably the same could be said  
8 for law firms, but it really comes down to that mindset.  
9 You've got to embrace this technology and be flexible, be  
10 creative, like Parker said. There is a shift that is --  
11 we're trying to stay ahead of, but it's going to be in the  
12 law firms, it's going to be in the law schools, and we're  
13 reaching all the way down to high schools right now to try  
14 to educate them. So we spend a lot of time in high  
15 schools talking about what is the practice of law today  
16 and in the future.

17           MS. WOOTEN: Thank you, Dan.

18           Judge Ferguson, we've talked about how  
19 lawyers use AI, how the everyday average person uses AI.  
20 What about the courts? Does your court use AI, and if so,  
21 how?

22           HONORABLE ROY FERGUSON: We do. We -- we  
23 try to use it a little bit everyday, but the -- what I  
24 would like this group to keep in mind and the Court to  
25 keep in mind when these rules are created, is avoid the



1 urge to treat AI as something different, as an artificial  
2 life form, a new nonhuman employee. When you do that, you  
3 suddenly have this fear that overtakes you, and you think  
4 we need to change all the rules, we need to have all of  
5 these special things for AI, whatever that means today or  
6 tomorrow. It is a tool. It is similar to when ProDoc  
7 launched and suddenly we had forms, right, that you could  
8 generate, and we all at the time said anyone who prints a  
9 ProDoc form and files it without reviewing and editing and  
10 making changes has made a huge mistake, and they're bad  
11 lawyers, right. It was a tool that must be incorporated  
12 into the practice of law, into the judiciary. So if you  
13 keep in mind that it's a tool, you're less likely to think  
14 we have to have all new rules for something we can't  
15 define that's amorphous and that will be different  
16 tomorrow from today.

17                   We use it to do things like I uploaded a  
18 form that was an order approving nonsuit, which some of  
19 you know is sort of a nonsensical order, but my clerks  
20 won't close a file without an order, and so whenever I get  
21 a nonsuit, we ask ChatGPT to create the form, print out  
22 the form. My coordinator puts in the name and the cause  
23 number and brings it to me. I double-check and make sure  
24 it didn't for some reason put something crazy in it, which  
25 it will, and in it goes.

1           We use it for categorizing applications for  
2 court-appointed counsel, and this is something some of you  
3 may have heard about. When -- all our applications, we  
4 moved online, so they're all done on a laptop with the  
5 magistrate. That data goes into a spreadsheet, and AI  
6 evaluates it. It takes a list of all the people who do  
7 not qualify, by rule, in our indigent defense plan and  
8 puts them into a rejection. It takes the ones that  
9 automatically qualify, because they're below the certain  
10 point, it puts them into the approval, and then it sorts  
11 out the gray ones and sends them to us.

12           Once we look at the list, we verify it's  
13 correct. We say yes, it automatically e-mails all of  
14 those people the appropriate response. "Here's your  
15 lawyer's name and number," and it copies it to the lawyer,  
16 "Here's your client and their application." If they're  
17 denied, it gives them a reset order and tells them "Come  
18 back next month, hire your lawyer"; and if it's in  
19 between, it comes to me, and I say yes or no, depending on  
20 another formulation that we do. That has saved us, my  
21 coordinator, one full day a week. She saves eight hours a  
22 week, and it took our application period from about 4.6  
23 days from arrest to appointment of counsel and  
24 notification to about .4 hours. That's how often our  
25 system runs. About every 20 minutes it runs through the

1 new ones that come in, so people are getting out of jail  
2 faster, right.

3                   This is the use of AI. But when -- but what  
4 we don't do is generate orders and sign them. We don't  
5 use it to respond as us like a chatbot, because you cannot  
6 do that. It's not a human, and it doesn't think. If  
7 someone calls you and says, "My mother died and I can't  
8 come to jury duty," the AI might say there's no conflict  
9 there. There's no sympathy. "You be there tomorrow at  
10 9:00 o'clock because the funeral is not until Saturday,"  
11 right? So it's not that. Do you want me to just put the  
12 list up real quick? I know we're out of time.

13                   MS. WOOTEN: Yeah. So I've been told we can  
14 go a little bit more, so let's, within the next five  
15 minutes, get your perspectives on whether we need new  
16 rules to address AI in Texas state court proceedings.

17                   MR. HANCOCK: I'm happy to start. Look, I  
18 think Judge Ferguson mentioned it a minute ago. The line  
19 between software and AI is getting blurry by the day, and  
20 eventually it's going to be impossible to see between it,  
21 so I think if there are -- if there are issues that are  
22 being raised by AI that are more technology neutral, like,  
23 for example, do you need to take a closer look at your  
24 authentication rules or something like that, go for it;  
25 but I think, really, the core challenge for me, first, is

1 you're not going to be able to point and say this is AI  
2 and that's not.

3           The other thing is when people are using  
4 commercial tools -- and we saw this in our presentation  
5 earlier. There was like a proposal that you should be --  
6 have to provide the data set. Well, if you're using a  
7 commercial tool, the provider will not tell you what's in  
8 that data for two reasons. It's trade secret, and second  
9 of all, they don't know what's in it either, right. One  
10 of the challenges of large language models is the idea of  
11 unfathomable data sets. They can tell you some general  
12 information about we got this from here, this from here,  
13 but, you know, when you're talking about a data set that  
14 would take a single human 20 million years to read from  
15 start to finish, no one knows, and I don't even know, if  
16 you had that information, how useful it would be.

17           So I just think there's -- you know, to the  
18 extent that we can leverage existing rules in a technology  
19 neutral way, that would be my preference.

20           MR. SCHUCH: Hard to follow that. That is  
21 exactly what -- I would agree. One caveat is, going back  
22 to the duty of competence, so maybe not a court rule, but  
23 I do think that competence of lawyers and training of  
24 lawyers, the state of Florida is one of the first to  
25 require a mandatory technology-based CLE of all lawyers

1 every two years. Might be -- that's the type of thing  
2 that I think would be very helpful.

3 MR. HANCOCK: Yeah, and one quick follow-up  
4 on that, because, actually, that brings up one more good  
5 point. Lawyer competence I think is something I think we  
6 need training on, and there's no way around it. A lot of  
7 the issues around data privacy, confidentiality, are  
8 things that I think echo a lot of the challenges that we  
9 had in the cloud era, when we went from long print to  
10 cloud, where they are real issues and we need to pay  
11 attention to them, but give it another 12 months, and I  
12 think that the normal course of business will mostly  
13 handle that. So it's something you do have to pay  
14 attention to. It was a really big danger in the first  
15 couple of months when these came out, because people were  
16 using free versions that didn't have any protections, but  
17 I think a lot of those problems are going to be worked out  
18 in just sort of the normal course of business, but  
19 competency won't be.

20 HONORABLE ROY FERGUSON: And my take away is  
21 no matter how good it gets, no matter how fast it develops  
22 and grows or how accurate it is, it will always be a tool.  
23 It will never be a person. It will never be actual  
24 intelligence. The reason you'll know that is because the  
25 day that happens, Skynet takes over the world, right. So

1 it will never be actual intelligence.

2           As you evaluate these rules and you decide  
3 how to change them, treat it like a tool, and it becomes a  
4 lot simpler when you look through and see what do we  
5 actually need to do? Do the rules incorporate this as  
6 just another method of being efficient as a lawyer, or are  
7 we going to pretend that it itself is the lawyer? Because  
8 that's when we have a problem with rules. So, you know,  
9 like we say here, keep your eye on the ball, don't try to  
10 stop its use. You can't. You shouldn't. It would be a  
11 mistake. Don't try to discourage or stop the use of AI.  
12 Just see it for what it is and don't overreact by creating  
13 rules that y'all are going to have to change every year as  
14 AI evolves and develops, because no rule you make today  
15 will still work in two years. You'll be busy.

16           MS. WOOTEN: Thank you so much to all three  
17 of you for your words of wisdom, for your experiences  
18 you've shared, and just for making time in incredibly busy  
19 schedules to come and visit with us today. Round of  
20 applause.

21           (Applause)

22           MS. WOOTEN: And that concludes our meeting.

23           CHAIRMAN BABCOCK: Thank you, everybody, and  
24 I think, if there's no other business, we'll be in recess.

25           (Adjourned at 12:14 p.m.)

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**REPORTER'S CERTIFICATION**  
MEETING OF THE  
SUPREME COURT ADVISORY COMMITTEE

\* \* \* \* \*

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 6th day of December, 2024, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,009.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 27th day of December, 2024.

/s/D'Lois L. Jones  
**D'Lois L. Jones, Texas CSR #4546**  
Certificate Expires 04/30/25  
P.O. Box 72  
Staples, Texas 78670  
(512)751-2618

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